United States Court of Appeals for the Second Circuit

APPENDIX

No. 77-1131

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To be argued by: ALAN M. DERSHOWITZ.

United States Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
APPELLEE,

v.

ROBERT P. MARCHAND, JR.,
APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT.

Appendix to Brief for the Defendant-Appellant.
Volume II.

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UNITED STATES COURT OF APPEALS
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UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

UNITED STATES OF AMERICA VS. ROBERT P. MARCHAND, JR.	Criminal Action # 76-51

Tried before the Honorable JAMES S. HOLDEN, Chief, United States District Judge, For The District of Vermont. Trial by Jury, at Rutland, Vermont, January 5,6, 7, and 10, 1977.

APPEARANCES:

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WITHOUT THE PRESENCE OF THE JURY

THE COURT: We will hear the defendant on motions to dismiss.

MR. WEINBERG: Thank you, Your Honor. I would ask that there be introduced, two volumes of testimony which was given to me as Jencks material earlier this morning, which we consider is full and complete testimony, which went to the GRand Jury which returned the indictment which is on trial today. It is two volumes. One is entitled: "The transcript of, the testimony of Victor ROY, July 1, 1976." The second is: "Transcript of testimony of Theodore HANDOGA, July 22, 1976." I ask that they be marked as exhibits for purposes of motion to dismiss.

THE COURT: They may be.

MR. WEINBERG: Thank you, Your Honor.- May I be heard briefly on this motion, Your Honor?

THE COURT: Yes.

MR. WEINBERG: The two witnesses that testified to the Grand Jury in question are Victor ROY and Theodore HANDOGA. Richard PERKINS did not testify live to this Grand Jury. Mr. ROY's testimony consists of four pages. Included in that is the statement that he did not know the last name of the individual who was the source of the marijuana. He knew him as "Big Foot". In the statement he did identify a picture. That identification of the picture has been excluded as competent testimony by Your Honor's rulings following defendant MARCHAND's Motion to Suppress identification testimony, that being the pre-trial photograph identification by Mr. ROY. Mr. HANDOGA's testimony consists in large part of a recital of a transcript he had of the Grand Jury testimony of RICHARD PERKINS.

Said testimony was given to a different Grand Jury prior to the commencement of the Grand Jury which returned the indictment against Victor Roy. Mr. Handoga recited that testimony at length and we haven't seen Mr. Perkin's testimony, but it is incorporated. It's almost the entire testimony with the exception of three or four pages which is represented by the Government's Attorney in the Grand Jury, to be warnings in the fact that it is voluntary and things like that.

Never did the Grand Jury which returned the indictment against Mr. Marchand, learn that they had a right to have Mr. Perkins testify to that. That is a very important criteria in the various cases which we have submitted in our memorandum in support of motion to dismiss #3. They never told us that this is not primary testimony and that if you wish primary testimony you can ask us and we will bring Mr. Perkins to you. Now inferentially, Mr. Perkins is available, the Government can contest that. I could call witnesses but I think we could agree he is available. The record shows Mr. Perkins came to Vermont from his home in Herkham, New York on numerous occasions, inculding the time that he testified to a Grand Jury. He came for at least three separate interviews by the Drug Administration at his own expense and there was no showing on the record of the Grand Jury that he was unavailable to testify live to the Grand Jury, which indicted Robert Marchand. I would ask Your Honor to address inquiry to the Government rather than my having to call witnesses as to whether or not they have any evidence that Mr. Perkins was unavailable on July of 1976, at

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the time that Theodore Mandoga had introduced a transcript of Mr. Perkin's testimony, to the Grand Jury.

THE COURT: We will allow the Government to respond to that after you have concluded your argument.

MR. WEINBERG: Okay, with that as a context, Your Honor, the legal comparison of its facts and the law goes as follows. First, there is no competent evidence that Robert Marchand is connected to the crime, given the testimony that went to the Grand Jury. There is no question that a crime occurred in July of 1975. There is no question that marijuana was distributed by Mr. Roy and Mr. Perkins, to Drug Enforcement Administration Agents in Burlington. Both in this motion and in the case itself, who is the source of this marijuana? Who gave the marijuana, and sold the marihuana and distributed it to Mr. Roy and Mr. Perkins? The Government will rely at trial, and did rely on in the Grand Jury, on two linkages; the photograph identification of Mr. Marchand by Mr. Roy, which Your Honor excluded and the photograph identification by Mr. Perkins. Taking the right identification first, at minimum, we have a biased Grand Jury. We have a Grand Jury that heard from Mr. Roy, without any detail that, " Yes, I identified the picture". The Grand Jury never learned any of the surrounding circumstances. The fact that that identification, as ruled by Your Honor, was unreliable, it was the result of impermissibly, suggestive procedures utilized by the Government to elicit that identification. So, think of the very start as a " threshhold issue", this Grand Jury was prejudiced against Mr. Marchand but the introductions to it of unreliable testimony. The testimony was the result of suggestive procedures that they never heard of any other procedures. They never learned how the photograph identification occurred. All they got was the conclusion, "Yes, ROY identified the picture."

So, as a first legal issue I don't think that the Grand Jury was impartial in the cases we have given to you. The Court stated that both historically and present day, the function of the Grand Jury is to act as an independent buffer between the Government and the citizens. If that function to be actualized impartially is a requirement that the Grand Jury doesn't get prejudicial material, what could be more prejudicial than an unreliable identification which is one of 2 linkages the Government is relying on to connect Robert MARCHAND to this crime? There is a case called U.S. v CALANDRA, which is a Supreme Court case saying that a witness cannot object if a Grand Jury is questioning him as the result of a legally-seized evidence Fourth Amendment violation. That case is different than thiscase in that in our case, Your Honor said the photographic identification procedure was unreliable. Fourth Amendment cases they throw out reliable evidence because it's a deterrent to the Government's misconduct, the deterrent to legal searches, but the evidence is reliable. It's the same contraband that you seize from a house. It's a very different situation here where we are talking about reliable procedures to elicit identifications. And so I suggest as a legal issue #1, there was not an impartial Grand Jury.

Secondly, there is Mr. Perkins' testimony, it comes in, in transcript form. One of the duties of the functions of the Grand Jury, Your Honor, is to judge the credibility. They ought to have the right to look at the witness and determine whether or not they can believe this witness sufficient to bring in an indictment. Most recently, I am sure others, when in doubt, the Government attempts to use Timothy Leary as the basis of various indictments. The Grand Jury heard Timothy Leary return no indictments, based on his wide-spread testimony around the country. So,Grand Juries do judge credibility and I suggest it's important to the maintenance of the fair and impartial Grand Jury and independant Grand Jury for them to hear witnesses. How can they judge Mr. Perkin's credibility when all they have is a D.E.A. agent reading off the transcript of what Mr. Perkins said some months ago. It becomes doubly critical in this case when Mr. Perkins was testifying under oath, he stated; he didn't make a positive photograph identification, he said it looked most familiar. He was asked to pick out the pictures that looked most alike the man he saw on july 18th. He picked out two pictures, one of whom was Robert Marchand and he said it was not a definite identification, it was the most familiar person. He picked out a second picture too, Your Honor. A man named Cronin, who is not indicted. None of that evidence went to the Grand Jury, not even the equivical nature of this photographic identification or the fact that he had identified someone else, The Government has no evidence. We are sitting next to the man who the Government suggests was Robert Marchand, on July 18, 1975.

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So, once again, not only was the Grand Jury deprived of their ability to judge credibility, the Grand Jury was also deprived of the surrounding circumstances which made Mr. Perkins' linkage of my client in this crime much weaker than the Grand Jury testimony would suggest.

When put together, both the hearsay nature of Mr. Perkin's testimony and the unreliable and excluded nature of Roy's testimony you have not only a biased Grand Jury not only a Grand Jury deprived of any kind of possible facts that could suggest that Mr. Marchand was not the person involved, either the facts of the suggestive identification procedures, or the fact that Mr. Perkins selected another man who the Government knows wasn't involved, there is no evidence involved. But there is no competent evidence that went to that Grand Jury.

When you make another step, the fact that the Grand Jury was deprived of knowledge, that they had the right to hear Mr. Perkins who turns out to be the only witness whose prior photograph identifications is even arguably admissable in this court. You have a Grand Jury proceeding that really doesn't conform to the historic functions or historic needs of the Grand Jury. This Grand Jury was a rubber stamp, Your Honor, when you look at it in a total perspective of what evidence they didn't have of the way they got Perkins' evidence and in the matter of Roy's evidence that was given to them without any mention of procedures. They didn't have an opportunity to judge credibility or to judge the totality of the of the circumstances. They were biased, they were not impartial and it's not a Grand Jury that had competent evidence. There was excessive use of hearsay, which has been frowned upon. Criticized by the Second Circuit in a series of decisions mentioned in my memorandum of law. I think for all those reasons, Your Honor should, -- I should like to ask Your Honor to make a ruling that really will deter the U.S. attorneys from treating the Grand Jury in anything but the most serious of ways.

There is a quote on page five of my memorandum which comes from the Second Circuit case of 1966, called: (U.S. versus Humans phonetic) It says: "We think it is not amiss for us to state that excessive use of hearsay, in the presentation of Government cases to Grand Juries tends to destroy the historic function of the Grand Juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions, the Grand Jury is supposed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to witnesses able to testify to facts from personal knowledge. I ask Your Honor, for all those reasons, there have been many circuit cases since then which constantly are asking the U.S. Attorneys to present primary witnesses to the Grand Jury. For all those reasons, I ask you to dismiss this case.

THE COURT: Who is going to argue the motion for the Government?

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MRS. JACOBSON: I will, and it's a preliminary matter. I would raise an objection by the Government to have the Defendant file his motion at this time. The reasons are as follows: We did have a suppression hearing on October 12th, 1976. Transcripts were available to the Defense shortly after that hearing and it came out in that hearing that Richard Perkins testified before a Grand Jury before his sentencing which was in March of 1975. It also came out that day that the indicting Grand Jury was sworn in, in March of 1976. So the Defense has had available, since October of last year, the knowledge that Richard Perkins did not testify live at the Grand Jury which indicted Mr. Marchand. They did file an earlier motion to inspect the Grand Jury minutes and no where in that motion was this issue raised. They never referred to it, they never referred to the fact that Richard Perkins was not there; they never referred to the fact that the testimony was not competent, and at that time it might have raised an issue that would have caused Your Honor to inspect the Grand Jury minutes to see if in fact they had any issue at all.

In addition, on that, -- included in the Defendant's motion to file the motion to dismiss late, he made some statements about that, I was unavailable because I was away on vacation and therefore he had no way of getting in touch with me and I would represent to Your Honor that Mr. Weinberg was given the name of John Hughes as an assistant in our office who was thoroughly familiar with the case and with whom he could discuss any questions he had if they came up during the

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time that I was out of the office. For those reasons we feel that this motion should not even be heard at this time. The Defense has already raised many issues regarding the Grand Jury transcript and it should not be entertained. However if Your Honor does consider the motion, we look at the Grand Jury transcripts, first of all Victor Roy's transcript. The testimony that Mr. Roy gave does not rely completely on a photographic identification of the Defendant. He states very specifically, on page three of the transcript, that he first met the person who supplied him with the marijuana, years ago in Massachusetts.

Now, these were things that did not come out at the suppression hearing because of certain problems that Mr. Roy had been testifying. It was presented to the Grand Jury and they had knowledge at that time from a witness that he had known this person for some time, and I think from that the Grand Jury could assume that he was fully capable of identifying the person he had known for years and had been involved with over a period of time and ingaged in several dealings with this person known to him as "Big Foot" or Bob, regardless of whether he knew his last name or not.

In addition, the testimony that was given by agent Handoga, in addition to the transcript from Mr. Perkin's testimony agent Handoga testified about surveillance that he conducted and also he testified about telephone toll records which tied Mr. Perkin's telephone, the telephone that is listed to Richard Perkins, to a telephone that was located in the house where Mr. Marchand was living. We feel that that also is competent testimony for

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the Grand Jury to consider, in order to connect the people involved, namely Mr. Perkins and Mr. Roy, with the Defendant, Mr. Marchand and that from that testimony they might reasonably find probable cause to believe that the Defendant, Robert Marchand in fact did commit the crime. As far as the transcript of Mr. Perkins testimony that was read to the Grand Jury by myself and agent Mandoga, it is hearsay. The Grand Jury knew that they were listening to a transcript because we read it right in front of them and we informed them that we were reading the transcript. They were not informed however, that Mr. Perkins could be available if they thought it was necessary.

THE COURT: Is there any reason why you want --

MRS: JACOBSON: No, Your Honor. I've had no knowledge that it is inconvenient for him to travel, but he probably would have been able to -- I would also point out that there are cases holding that this kind of procedure is perfectly acceptable if Government agents in fact give sworn testimony before a second Grand Jury as to what they and other witnesses have stated to the first Grand Jury. There are second --

THE COURT: I don't find that cited in the Defendant's memorandum.

MRS. JACOBSON: Excuse me.

THE COURT: I said, I don't find that authority cited in the Defendant's Memorandum.

MRS. JACOBSON: All right, I'd like to give you that authority.

THE COURT: The Government hasn't filed any, so I would like to have it.

MRS. JACOBSON: I think that this is U.S. v. Hodge. 496 -Fed. Second-87. That is a Fifth Circuit case, 1974.

THE COURT: U.S. v. Hodge?

MRS. JACOBSON: Right. H-O-D-G-E. And the Court in Hodge, was relying on the Costello case; a Supreme Court case, which also has allowed the use of hearsay testimony before a Grand Jury. There are cases in the Second Circuit, where Judges have stated that they prefer live testimony and they condemn the use of solely, hearsay testimony. In other words they prefer at least that there be someone's testimony and that was done in this case. Even if Perkins' testimony was thrown out, they had the testimony of Victor Roy and Agent Handoga.

Furthermore, I would like to point out that the quote from the Humans case that Mr. Weinberg just referred to was some what incomplete. The first sentence of that paragraph specifically states that the Court which was the Second Circuit Court, does not condemn the procedure that was used before the Grand Jury. And in that case a Government agent summarized the testimony of the other witnesses who later testified at the trial, but who had never appeared before the Grand Jury. Affidavits were given to the Grand Jury that related what their testimony would be, but that's all. And we feel that in this case the Grand Jury did get an entire transcript of Richard Perkins' testimony, and a word-for-word transcript. They did have a live testimony of Victor Roy, where he stated he knew the defendant , being -- well, he knew the supplier, "Big Foot" or Bob, very well and he had the testimony of Agent Handoga. And, we feel for those reasons, the case should not be dismissed, in fact the motion should not even be considered at this time.

MR. WEINBERG: I'd like to respond, just briefly, Your Honor.

THE COURT: Yes.

MR. WEINBERG: In terms of motions, I filed a motion to produce Grand Jury transcript and information during the original batch of pre-trial motions and stated I wanted the Grand Jury minutes because of the Estepa problem, hearsay problem. I haven't been able to locate the second Grand Jury minute motion, but I think it referred to some of these problems. Moreover, until I spoke to Miss. Jacobson, as stated in the motion to file later, I never knew the Perkins' transcript went to the Grand Jury. I knew that Perkins was unavailable but I did not know that Mr. Perkins' transcript was read to the Grand Jury. In fact I, until today, I hadn't seen the Grand Jury minutes and didn't know whether,-- for sure, whether the Grand Jury was ever informed they could hear Mr. Perkins. So, really, until today I wasn't able to file the motion, definitively. I tried my best to get the Grand Jury minutes and I asked Your Honor to read them in camera. It's hard to proceed on motions challenging the Grand Jury process, without having the minutes here. In terms of not asking Mr. Hughes during that week, I never asked Miss Jacobson before,--

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THE COURT: Well, the Court is hearing the motions, go ahead.

MR. WEINBERG: Okay. The only other thing I'd like to mention in terms of the Humans case; the Humans case dissapproved of hearsay. They didn't condemn it at that time. It was first in the line of Second Circuit cases, went through Estepa and through cases more recent where they dismissed indictments which started to warn the prosecutors in the Second Circuit "Don't use hearsay, unless you have to" Here they didn't have to. Mr. Perkins, again I state, three times at least, went to see Mr. Handoga for the D.E.A. interviews at his own expense. He was available. So although the Humans case did not throw out the indictment. It was the seminal case in the Second Circuit which began to establish a policy under supervisory powers in the Second Circuit, which Estepa refers to, of dismissing indictments which successively rely on hearsay. The Fifth Circuit does not have that policy. The Hodge case is different, but in this circuit, there is a supervisory policy of trying to make the Grand Jury meaningful.

I ask Your Honor to dismiss the case in accordance with that policy.

THE COURT: The Court wants to read the minutes that have been submitted by way of Defendant's Exhibit "A" and "B". And, I'll reserve ruling on the motion to dismiss the indictment until that opportunity has been made available.

I believe there is also a -- at least the Government indicated that you had a motion, regarding the subpoena in this case.

MRS. JACOBSON: That is correct, Your Honor. The Government would move at this time to quash the subpoena that was served on [illegible]ald Allard, the probation officer in Burlington, Vermont. The subpoena requests that the pre-sentencing investigation reports were statements made by Victor Roy and Richard Perkins and those reports should be made available to the Defense. And, we would object very strongly to that, in line with the advisory committee notes on Rule 32 and case law. The committee notes discuss pre-sentence reports and discuss it in terms of the fact that they should not become available to unauthorized persons and reprots shall be part of the record. It shall be sealed and opened only on order of the Court. In line with that there has been case laws involving even the Defendant's request to see pre-sentence reports involving themselves. The Defendants have been held not even to have an absolute right to see pre-sentence reports and the need to keep them secret would seem to be even more compelling when a third party simply requests a pre-sentence report dealing with someone else. These reports are confidential reports. They are court records. They are not records that belong to the prosecutor's office or to the United States Government. They are not public records and traditionally have not been made available to parties outside the Court. Probation officers have been held by different courts, not to be court investigators and they report only to the Judge and the probation officer and not to the prosecution. We have --we hold that this

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material is not 35 hundred material , that it is not anything that is available to us. It is not something that we are required to turn over or neither is the Brady material that we would be obligated to turn over as exculpitory evidence to the defense.

Requests have been made for pre-sentence reports several times by co-defendants, certain people and court held that certain reports are provided solely for the Court's use and since the co-defendant in question had not consented to the disclosure that the Brady is inapplicable and since they are not public records they would not be turned over.

I think in the United States v. Walker, which is a Ninth Circuit case in California the Court did not allow the-- well, quashed the subpoena served upon a probation officer. He did request informally that the probation officer look through the report to see if there was any exculpatory material for the Defense. That was about as far as any Court has gone on this issue.

We feel that this Court should certainly go no further than that and we would object to anything being turned over, at all.

THE COURT: Yes.

MR. WEINBERG: Briefly,Your Honor, it's my understanding that both Mr. Roy and Mr. Perkins made written statements to be used in the pre-sentence investigation as part of this investigation of the offences. I think there is a-- firstly; Jencks material and secondly, I believe them to be

Brady material. I don't think there is any privilege, common law privilege or otherwise, that protects the information if it falls within the-- either 18-U.S.C. 35 hundred or exculpatory evidence.

When the Federal Rules of Evidence were being formed, there was no proposed privilege for probation of records. There has never been a common-law probation report privilege, so I don't think the Government's on firm footing when it asked to quash the subpoena. Meaningfully, if you have statements by witnesses, and let's assume the witness there said: "John Smith gave me the marijuana." But the purest form of exculpatory evidence. Government is suggesting that we can't get that recorded. I just don't think that that is fair, Your Honor.

THE COURT: Well, the Court will review the pre-sentence report in request that they weren't made to this court but Judge Coffrin. I will review the pre-sentence report. to see if Jencks material and Brady material are in it and if so, whether the demands of justice over-ride the strong policy considerations against disclosure.

MR. WEINBERG: The only thing I am interested in the whole pre-sentence report is just the defendant's version of the offense, the statements made by Roy PERKINS.

THE COURT: Very well, the Court will consider that. Proceed with the Government's motion to, - in relation to the identification by the witness, ROY.

MR. WEINBERG: Has my oppositien been denied, Your

Your Honor, to the -

THE COURT: What?

MR. WEINBERG: I filed a Motion this morning, Your Honor, has that been denied? A motion in opposition to the re-opening of the motion -

THE COURT: I haven't seen that.

MR. WEINBERG: It was filed with the sequester motion.

THECLERK: Those were the two I gave you this morning, Your Honor. Papers 62 and 63.

THE COURT: I have 63. Go ahead. We'll allow you to proceed. Do you wish to be heard before the Government proceeds?

MR. WEINBERG: The motion says what I would otherwise say, Your Honor, just that the Government's burden, the burden was on the Government. They had a full opportunity and I don't think, you know, when they lose, they should be able to reopen the hearing.

THE COURT: The motion in opposition to, which I take it to mean that you oppose any effort by the Government to show any independent identification or untainted identification, will be denied. We'll allow the Government to proceed in my prior order.

MISS JACOBSON: Your Honor, preliminary to that I have one statement that we were talking about this morning about the case agent and I didn't want to talk about this in front of the Jury because I wasn't sure what representations the

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defense would make. Agent HANDOGA has been the case agent on this case and we would request that he be allowed to sit with us in the court room. I would, if I could find a copy of the motion that I got this morning, I would object to the representations that were made in the motion about Agent Handoga's testimony contradicting that of Richard PERKINS, I believe, and in those representations made about Victor ROY and would request that he be allowed to be present in court.

THE COURT: We will allow Agent HANDOGA to sit in court and the exclusion, the sequestration of the other witnesses, both by the Government and the Defendant, will not include Agent HANDOGA.

MR. WEINBERG: May I make or note my objection?

THE COURT: We will note your objection.

MR. WEINBERG: Also Your Honor I will just ask that the Jury again be asked if Mr.Handoga's name was never mentioned to them and he wasn't here during the voir dire, we don't know whether any of them have ever had any contact or know him, but that's another problem. You know, when the agent wasn't here during the voir dire and suddenly appears, I think that may be, might be some prejudice to the defendant, if anybody knows him, which we don't know.

THE COURT: I believe the Court inquired whether any of them had any acquaintanceship with any officers in the Drug Enforcement Administration.

MR. WEINBERG: They may know him but not his occupation.

THE COURT: You may proceed.

MISS JACOBSON: All right, Your Honor, regarding the identification of Victor Roy, I believe Mr. HUGHES SPOKE to you before. We would request a meeting in Chambers with you and Mr. Roy's attorney and Mr. Roy before we begin that hearing.

THE COURT: Well, the Court won't have any conference in Chambers absent the defendant and his counsel.

MISS JACOBSON: Well, Your Honor, we feel that the particular subject that we would discuss is not relevant really to the defendant or the defendant's counsel at this point. It is something that involves Mr. ROY and his constitutional rights and his ability to testify and we think this is something that Your Honor can rule on outside the presence of the defendant- and his attorney.

THE COURT: Well, the Court won't entertain any part of these proceedings except an in camera inspection of the minutes that have been submitted out of the presence of the defendant and his counsel. And the Court, if there is a claim of privilege here, the Court won't rule on that in the absence of the context of specific questions.

MISS JACOBSON: Very well, Your Honor, then we will proceed with the -

THE COURT: Very well.

MISS JACOBSON: All right, our first witness would be Agent HANDOGA.

THE COURT: Mr. Handoga.

T-H-E-O-D-O-R-E S. H-A-N-D-O-G-A, having been called as a witness by the Government was duly sworn by the Clerk and testified on his oath as follows:

DIRECT EXAMINATION BY MISS JACOBSON:

Q. Agent Handoga, would you state your full name please?

A. Theodore S. Handoga.

Q. And would you state your occupation, please?

A. I am Special Agent in Charge for the Drug Enforcement Administration office in Vermont.

Q. All right, I would like to show you what's been marked here as Government's Exhibit #11 for identification. Can you identify that, please?

A. Yes, I can.

Q. Would you tell us what it is?

A. This is the personal property of Robert B. MARCHAND. It was seized in Florida by Special AGent HARRIS and he forwarded it to me in a sealed condition under Registered Mail.

Q. And do you recall that date that you received that from Agent HARRIS?

A. No, I don't know the exact date.

Q. And was it s[illegible] when you received it?

A. Yes, it was.

MISS JACOBSON: Your Honor, I'd like to, I would also call your attention to the transcript of the earlier suppression hearing on this point on page 83 if you have the transcript or the defense does. Agent HARRIS had testified on October 12th that in fact he did take this from this defendant MARCHAND's person and that he put it in a sealed envelope and mailed it registered mail to Agent HANDOGA.

THE COURT: The Court has that in mind.

MISS JACOBSON: All right.

MR. WEINBERG: The defendant would respectfully move to strike, Your Honor, for the following reasons. Although hearsay is allowed in motions to suppress hearings, when we are determining whether or not a man can identify in court. I think the highest standards are required and those standards require does this man have enough primary evidence, is there enough primary evidence on the record to demonstrate acquaintanceship.

THE COURT: Objection is over-ruled. Proceed.

MISS JACOBSON: I'd like to offer this envelope and its contents into evidence.

MR. WEINBERG: Our objections, Your Honor, would be firstly to renew our objection that was the basis of the motion to suppress. Secondly, the hearsay nature, the lack of primary chain of custody in this.

THE COURT: Proceed.

MISS JACOBSON: Your Honor, will this be admitted?

THE COURT: Yes, it will be received.

Q. Agent HANDOGA, after you received this envelope from Agent HARRIS, did you open it?

A. Yes, I did.

Q. And did you inspect the contents?

A. Yes, I did.

Q. Take a look at the contents plase, and tell us if they are the same now as they were on the day that you received them?

A. Yes, these contents are the same as when I received them.

Q. Have all the contents, have all those papers and things that were contained in the envelope, been initialed by Agent HARRIS?

A. Yes, they have.

Q. And have they been dated by Agent HARRIS?

A. Yes, they have.

Q. As far as you know, Agent HANDOGA, has anything been removed from that envelope?

A. Nothing has been removed from this envelope.

Q. Thank you. I have no further questions.

CROSS EXAMINATION BY MR. WEINBERG:

Q. This envelope was received on what date, Agent Handoga?

A. I'm not sure. I'm not sure what date it was received.

Q. July of 1976?

A. I'm not sure.

Q. It was subsequent to the indictment in this case, is that right?

A. Yes, it was.

Q. So that none of this evidence went to the Grand Jury, is that correct?

A. That's correct.

Q. Thank you, sir.

MISS JACOBSON: We have no further questions of AGent Handoga, we would like to call Victor ROY.

(Continued on next page)

V-I-C-T-O-R R-O-Y, Jr., having been called as a witness without the presence of the Jury was duly sworn by the Clerk and testified on his oath as follows:

MISS JACOBSEN: Your Honor, we would call Mr. Victor Roy to the stand.

MR. CANTANZARO: Your Honor, may I be heard? I am Angelo P. CANTANZARO. I am Mr. Roy's attorney and I preliminarily ask the Court's permission to step before the Bar on behalf of Mr. Roy.

THE COURT: Are you admitted to practice in this Court?

MR. CANTANZARO: I am a member of the Bar in Commonwealth of Massachusetts and for the Federal District Court in the District of Massachusetts.

THE COURT: We'll allow you that privilege. What is your last name?

MR. CANTANZARO: Cantanzaro, C-A-N-T-A-N-Z-A-R-O.

THE COURT: Very well.

MR. CANTANZARO: Thank you, Your Honor.

THE COURT: You may proceed, Mr. Cantanzaro.

MR. CANTANZARO: Well, Your Honor, the purpose that I am here for today is simply to see to it that Mr. Roy's constitutional privilege against self-incrimination is adhered to either, well, basically through a grant of proper and sufficient grant of immunity. I have had a brief discussion with the United States Attorney this, early this afternoon and she has indicated to me that no such grant under federal statutory authority, specifically 18 U.S.C. 6001, 6002

6003 has been afforded Mr. Roy. Rather, the United States Attorney has informed me that they feel that a letter from the States Attorneys from Windham County, State of Vermont and from the States Attorney in Chittenden County in the State of Vermont, is sufficient immunity to guarantee Mr. Roy's privilege against self-incrimination and to allow him to testify here today and our position is, Your Honor, that that, number one, that grant of State immunity is insufficient and that Mr. ROY should be afforded a, should be afforded immunity can be afforded him pursuant to federal legislation. And on those grounds, Your Honor, Mr. Roy is, at this moment, will assert his privilege under the Fifth Amendment.

THE COURT: We'll allow the Government to proceed and we'll ask you to address any objection you may have to the specific questions that are asked by the Government.

MR. CANTANZARO: Very well, Your Honor.

DIRECT EXAMINATION BY MISS JACOBSON:

Q. Would you state your name for the record again, please?

A. My name is Victory ROY.

Q. All right, Mr. ROY, where are you living now?

A. I am living in COLORADO.

Q. And would you tell the Court where you were living in July of 1975?

A. I'm going to assert my Fifth Amendment right, right now, under the advice of counsel.

THE COURT: Well, the Court doesn't see where you were a resident, do you claim that the residence at that particular time?

MR. CATANAZARO: Your Honor, our position at this point is that anything that relates to anything that happened in July of 1975, specifically on July 18th, would compel the privilege and that I would ask the Court at this time to hear me in camera on the full extent of why Mr. Roy is exercising his privilege at this time.

THE COURT: Why is it necessary to have an in camera hearing?

MR. CATANAZARO: Because the matters that I will reveal to the Court have to do with possible and I do say "possible," abridgements or infringements of other federal laws.

THE COURT: You, - I understood your first question was addressed to State immunity or your first -

MR. CATANZARO: Well, what I was told by the United States Attorney was that Mr. ROY has been afforded State immunity by the respective State Attorneys that I mentioned. I do not believe that that is sufficient immunity if in fact it is immunity at all.

THE COURT: But the present question that is presently pending I take it is addressed to possible incrimination as far as other federal statutes are concerned?

MR. CATANZARO: That's correct, Your Honor.

THE COURT: IN addition, the Court has, - takes notice that in the record it appears that the defendant or, that Mr. ROY was a defendant in other proceedings in the

United States District Court before Judge COFFRIN.

MR. CATANZARO: That is correct.

THE COURT: I take it your, the point that you are raising now as it concerns offenses that were not involved in that particular prosecution?

MR. CATANZARO: That's correct, Your Honor.

THE COURT: Will you read back the question, Mr. Vesper.

(LAST QUESTION READ BY THE REPORTER)

MR. ROY: Am I to answer that?

MR. WEINBERG: Probably it is because that Mr Roy's counsel doesn't know the background in the case, the address could lead to involvement, - could lead to toll records which could lead to involvement in other offenses. I know that he hasn't received the discovery that I've received and the Court should really be aware that the address does involve numerous incidents which, you know, which harm Mr. Roy.

MISS JACOBSON: Your Honor, I would object to Mr. Weinberg saying anything on behalf of Mr. Roy.

THE COURT: Yes, it is a privilege that is personal to the witness and the Court will hear counsel in this particular point. Is there any objection on the part of the defendant or his attorneys to the Court, granting the request of Mr. Cantanzaro to hearing the defendant in camera.

MR. WEINBERG: So long as the Government and the defendant are excluded, I have no objection, Your Honor.

THE COURT: How about the Government?

MISS JACOBSEN: Your Honor, I think the Government probably should be there since we would have to discuss the possibility or non-possibility of securing any kind of federal immunity for Mr. Roy as far as his testimony is concerned.

THE COURT: The Court will rule that the pending question may be answered as to where the witness resided in the year in question.

MR. CATANZARO: May I consult with my client for one moment?

THE COURT: Yes.

(Counsel and witness conducted whispered conference)

MR. ROY: On the advice of my counsel I would have to exercise my right under the Fifth Amendment to remain silent.

THE COURT: We will observe the privilege and you will not be compelled to answer the pending question.

MR. CATANZARO: Thank you, Your Honor.

MISS JACOBSEN: May I have a minute, Your Honor?

THE COURT: Yes.

MISS JACOBSON: Your Honor, at this point, I think perhaps we had better put the Government's position on the record as to this matter.

THE COURT: Very well.

MISS JACOBSON: I well, I will file a Memorandum of Law that we had put together and I would point out again, Your Honor, as you just mentioned yourself that Mr. ROY was involved in the District Court in this State for a crime that was committed on or about July 18, 1975, as he entered a plea of guilty in the Federal Court before Judge COFFRIN to one of three counts involving possession with intent to distribute 180 pounds of marijuana.

It is the Government's position therefore, that jeopardy has attached and there is no further way that this witness can be incriminated by anything he says about the events of that day.

There is no way that our office can obtain any further immunity for this witness because of the fact that jeopardy has attached. The Department or the Attorney General will not grant immunity to a witness in a case like that.

Furthermore, the State's Attorneys of the two counties involved in that transaction where Mr. Roy obtained the marijuana from his supplier and where the distribution was attempted, have both agreed to grant Mr. Roy immunity from prosecution for any of those things that happened on July 18th, 1975.

We feel therefore that since he has been convicted in the Federal Courts of that particular crime and the acts on that particular day and since he has been granted immunity by the State's Attorneys for that crime on that day, that he has no privilege and cannot incriminate himself at this point and therefore, must be compelled to testify. If he does not testify by order of the Court which Your Honor just made a few minutes ago, then he suffers the risk of contempt of Court and we think he should be advised of that and advised of the protection that he is afforded by a grant of immunity and what double jeopardy does mean.

I would further like to put on the record, Your Honor, that the U.S. Attorney's office here will not prosecute Mr. ROY for anything that he says in Court, any testimony that he gives on this case. I think that should be very clear, that there is no real risk, no danger, no foreseeable prosecution of this witness in the Federal Court in this State.

THE COURT: I will read your memorandum briefly. (Reading silently).

Is the Government aware of any change in the Vermont statutes regarding the question of immunity since the State against REED in 127 Vermont and State against CRAYPO?

MISS JACOBSEN: Your Honor, the only statute that we are aware of is Title 12 of the Vermont Statutes Annotated Section 1664 and its statute -

THE COURT: 12 VSA Section -

MISS JACOBSEN: 1664. It's a statute that is very similar to the federal statute concerning grants of immunity. It deals however, specifically only with testimony given in Vermont State Courts and this is a case where the testimony is being given in the Federal Court. We think the procedure is basically what we are trying to do. The States Attorneys have agreed to grant immunity to the witness. We have presented that to Your Honor and we feel it is up to Your Honor to rule on that immunity as you have the power to do under the case that you just referred to, the REED case, which I think Your Honor is familiar with.

The power of the State's Attorney has not been changed and under 24 VSA Section 361 (a), the State's Attorney has authority to prosecute for offenses committed within the jurisdiction of this particular county. He also has almost complete discretion and in withholding prosecution and in agreeing not to prosecute someone and we feel that event absent, well now that there is that statute, so there is some authority for it, he has requested it and we feel it is up to the Court to accept that offer made in good faith and order the witness to testify.

We think that is fully sufficient to guard the witness' rights and to prevent any possibility of self-incrimination.

THE COURT: I'll take a brief recess to check the Memorandum and also, I notice that you have filed some letters or communications from the State Attorneys of Chittenden and Windham Counties.

MISS JACOBSEN: That's correct, Your Honor, and I notice that at this time the two attorneys, State's Attorneys in those counties have sent letters directly to the attorney of Mr. ROY. They have sent it to his office in Boston. I am not sure whether they have received both of them at this point but there are, the second one is, at least on their way.

I see they have gotten the one from Windham County and Mr. Murray of Chittenden County has probably sent it this week so he has gotten a direct communication.

MR. CATANZARO: May I inquire of the United States Attorney is the letter that His Honor has in his possession right now, this letter and the letter sent by the Chittenden County Attorney?

MISS JACOBSEN: The letters, -

MR. CATANZARO: Or the original ones that -

MISS JACOBSEN: The original ones that I sent to Mr. Roy.

MR. CATANZARO: Well then I would also like the Judge to consider this letter which is dated December the 28th which my office just received less than a week ago. It is substantially the same but it is also different.

THE COURT: Very well, I, -

THE CLERK: Would you like that filed, Your Honor?

THE COURT: We'll see.

(Letter being shown to the Assistant U.S. Attorney by Mr. Catanzaro).

MR. CATANZARO: I would still like to submit it to the Court.

THE COURT: You may tender it.

(Document handed to the Court)

THE COURT: Who is Thomas Troy?

MR. CATANZARO: Mr. Troy is a member of my office who was originally retained by Mr. Roy.

THE COURT: Very well, the Court has it in mind. as to this narrow question. How do you claim that it is any different than the -

MR. CATANZARO: Well, just that the last sentence was a little bit different than from the proviso that they had.

THE COURT: The proviso?

MR. CATANZARO: Yes. or, the last sentence is my concern with these letters in particularl, but I do have a lot of concern, not only with the Government's memorandum but also with compliance with the Vermont Statute. No matter how many times I read the statute, I cannot see the authority given to a State's Attorney to extend immunity under these circumstances and you know, that is my position right now, in the State immunity and if we ever get to the in camera stage, I will elucidate my position on the necessity for federal immunity.

THE COURT: Very well, the Court will take the motions under consideration as well as the Court's ruling as to the pending question that has been addressed to Vincent Roy.

(RECESSED AT 2:42 P.M. UNTIL 3:20 P.M.)

THE COURT: Motion of the Defendant to dismiss the indictment is denied. The Court, after examining the provisions cited by the Government relative to the immunity granted by the Sate of Vermont, finds that there have been no valid grant of immunity by the State of Vermont on the present state of the law. Nor, has there been any indication that immunity was provided pursuant to the provisions of Section 1664 of Title 12 of the Vermont Statutes Annotated.

The Court will grant the Government's motion to quash the subpoena that was issued against the Chief United States Probation Officer, or members of his staff.

MR. WEINBERG: May those portions of the pre-sentence record that contains statements by Mr. Roy and Mr. Perkins be marked for identification and sealed for any -

THE COURT: Certainly, the Court will direct that the pre-sentence report be sealed so that in the event there is an appeal in this case that the Appellate Court will have the opportunity to inspect the pre-sentence report.

I will say that since the Court finds that there is no valid immunity granted by the State of Vermont concerning the matters dealing with the indictment in this case, the Court sees no reason to pass on the defendant, on the witness Roy's claim of immunity under other federal prosecutions, but the Court notes that the Government has refused to request an order under the provisions of 6003 I believe it is, of Title 18.

We'll hold the Jury until after -

MR. WEINBERG: That's all right. The defense requests that the Government be instructed in their opening to not mention two things. One is any proposed testimony from Mr. Roy and 2, is any mention of Mr. Perkins' sketch of, or prior photographic identification on the grounds that those are evidentiary issued to be ruled on in the context of Mr. Perkins' testimony as to whether or not it is admissible testimony, or hearsay or whether or not it is admissible under the Federal Rules of evidence.

THE COURT: Well, the Court is not going to give any specific instructions to the United States Attorney regarding their opening statement. I believe the Government will not undertake to comment on any testimony they intend to offer about the, through the witness Roy, but as far as any further evidentiary matters, the Court will rule on those questions as they arise during the context of the trial.

MISS JACOBSEN: Your Honor, we did have a second witness who was going to testify at the hearing. That was Mr. Perkins who has some testimony to offer as to Mr. Roy's ability and I think at this point, the Government can still seek. We have been told that we can get immunity from the federal government for Mr. Roy and probably by tomorrow morning we can get sufficient State immunity so he can testify in the trial.

THE COURT: Well, do you wish to present that evidence now?

MISS JACOBSEN: Mr. Perkins?

THE COURT: Yes.

MISS JACOBSEN: Yes.

THE COURT: Will you bring in the Jury. In view of the fact that the Government has further evidence to offer on that point. It is apparent that we won't be able to proceed with the trial, I see no reason, until these motions are disposed of, I see no reason to hold the Jury longer. If you'll bring the Jury in, we'll excuse them for the day.

MR. WEINBERG: Judge if it would save time and if it is in accord with everybody's plan, perhaps if the Government does get immunity, perhaps then prior to Mr. Roy's testimony they could have the voir dire and we can proceed with the jury today and we would only offer that as an alternative.

THE COURT: Well the Court will proceed as I have indicated.

(Jury entered court room at 3:34 p.m.)

THE COURT: Members of the Jury the time consumed was in the Court's dealing with various motions that have been advanced by both the Government and the defendant indicates to the Court that we will not be able to proceed with the trial as far as the Jury is concerned this afternoon. The Court has further matters to consider and for that reason, you will be excused until tomorrow morning. But again, the Court wants to emphasize that during recess or at any other time, you are not to discuss the case with any person or read about it in the press. There is a representative of the press here and undoubtedly there will be certain information published in the newspaper and the Court specifically directs that you not read any comment about the newspaper reports concerning the trial in this case, nor listen to any discussion, either in the news media or from any other source. And with that strict injunction the Court will excuse you until tomorrow morning at 9:30.

(AT 3:35 P.M. THE JURY WITHDREW FROM THECOURT ROOM)

MR. HUGHES: With the Court's permission I would like to leave.

THE COURT: You may. The Government may proceed.

MISS JACOBSEN: The Government would call RICHARD PERKINS to the stand. I believe he is outside, I'll go get him.

RICHARD PERKINS, having been called as a witness by the Government, was duly sworn by the Clerk and testified on his oath as follows:

DIRECT EXAMINATION BY MISS JACOBSEN:

Q. Would you state your full name again for the record?

A. Richard Perkins.

Q. Where are you living now, Mr. Perkins?

A. Herkimer, New York.

Q. And would you tell us where you were living in July of 1975?

A. In Waittsfield, Vermont.

Q. All right, are you the same Richard Perkins who was involved in a marijuana transaction on July 18, of 1975?

A. Yes, I am.

Q. And was a part of that transaction take place in Brattleboro, Vermont?

A. Yes.

Q. All right and is Brattleboro the place where you obtained the marijuana?

A. Yes.

Q. And where did you subsequently attempt to distribute the marijuana that you obtained?

A. In Burlington, Vermont.

Q. And at that time, when you were attempting to distribute the marijuana were you arrested?

A. Yes, I was.

Q. Now, I'd like to return to Brattleboro, Vermont, at the time you obtained the marijuana. Can you tell the Court who was present at that time?

A. In Brattleboro, with me?

Q. Right.

A. Victor Roy.

Q. All right now did you have occasion to meet with anyone else in Brattleboro?

A. Two other people.

Q. And do you know those two people by any names?

A. "Big Foot" and I am not sure of the other one.

Q. And would you tell us please, how that meeting between you and Victor Roy and "Big Foot" and this other person, was arranged?

A. It was arranged through a phone call and then we just were, we were supposed to meet at Howard Johnson's down in Brattleboro.

Q. Okay, would you tell the Court how you came to know this person, "Big Foot"?

A. Through Victor Roy.

Q . How did that happen?

A. We drove down to, I'm not sure of the exact location, and met with a man, "Big Foot" and just talked for 15 or 20 minutes.

Q. Do you know that man "Big Foot" by any other name?

A. I am not sure. I think, -

Q. Do you reall any other name at this time that you ever heard?

A. Maybe "Bob".

Q. Did Victor ever tell you where he had first met this person "Big Foot"?

A. No.

Q.. Did he ever tell you when he met?

A. No.

Q. Did he ever say how long he had known him?

A. No.

Q. Did you ever have occasion to make a phone call in order to reach "Big Foot" or "Bob"?

A. I don't recall, if I, if I, - I may have.

Q. Well I'd like you to think about it and see if you can recall. Think about it for a minute.

A. (Complying).

Q. Now, do you recall if you ever made a phone call or not to this person "Big Foot" or "Bob"?

A. I'm not really, I'm really not sure if I, - I, - I remember talking with him on the phone. I think I picked the phone up.

Q. The phone rang in your house and you picked it up?

A. Right.

Q. So you talked to him over the phone but you are not sure if youever called him?

A. No, I'm not.

Q. Do you know if Victor ever called him on the phone?

A. I couldn't say "yes" for sure.

Q. Did Victor ever tell you that he had gotten a phone number from Bob or "Big Foot"?

MR. OTERI: Objection, Your Honor.

THE COURT: Objection over-ruled.

Q Did Victor ever tell you that Bob or Big Foot had given him a phone number where he could be reached?

A. Would you repeat that?

Q. Yes, did Victor ever tell you that Big Foot or Bob had given Victor a phone number to call him?

A. I think there was a phone number that he could be reached at. There was a phone number he could be reached at, not all the time.

Q. All right on how many different occasions did you see this person you know as "Big Foot" or "Bob"?

MR. OTTERI: Your Honor, he said maybe the other name was Bob. He said he knew him as "Big Foot" and maybe by another name.

THE COURT: Do you object?

MR. WEINBERG: Yes.

THE COURT: Objection is overruled, proceed. I will say that I don't need any speeches with every objection. We'll allow you to make an offer or state your objection but other than that, I think the trial will proceed much clearly if you state your objection in short, concise terms without argument.

MR. WEINBERG: Yes, Your Honor.

THE COURT: Proceed.

Q. Do you recall the question I just asked?

A. No.

Q. All right, do you remember how many times you saw this person you knew as "Big Foot" or "Bob"?

A. 2 or 3 times.

Q. And on each of these occasions when you saw this person was Victor also present?

A. Yes, he was.

Q. Were any of these occasions during the day?

A. I think mostly after 5 or 6:00, after, well after dinner, some time like that.

Q. Do you remember what time of day you saw him on July 13, 1975?

A. I think that was on 2 or 3 in the afternoon. Around that time.

Q. When you saw Big Foot, did you ever observe Victor talking to him, face- to-face?

A. I think like, I guess so.

Q. All right now, I'd like to talk about each of the times you saw Big Foot. The first time that you recall seeing him, can you tell us the length of time that you spent with him, approximately, to the best of your recollection?

A. About 15 minutes.

Q. All right and how close were you to Big Foot when you saw him that day?

A. I was probably about five or six feet away from him.

Q. About how close was Victor away from him that day?

A. About five or six feet. He was probably about five or six feet away from him.

Q. All right now on the second occasion when you saw Big Foot, was that, about how long did that meeting last?

A. The second time?

Q. Yes.

A. I didn't see him. It was, I just didn't see him that time.

Q. Well, you said that you saw him 2 or 3 times, right? Now, think about the second time that you did see him.

A. Oh, the second time I did see him.

Q. Right. About how long did that meeting last?

A. About five minutes.

Q. Okay and was Victor present at that time, too?

A. Yes, he was.

Q. And was he with Big Foot for about five minutes at that time as well?

A. He might have been with him longer.

Q. Can you tell us why that, why he would have been with him longer than you?

A. He just, - I think he went with him.

Q. He went with him some place?

A. Right.

Q. Do you know how he went with him? Did he walk away some where or get in a car?

A. He drove away with him.

Q. Did he drive away in the same car?

A. Yes.

Q And he was sitting next to Big Foot or Bob in that car?

A. Yes, as best as I can remember, yes.

Q. And do you remember about- how long he a was gone?

A. Couple of hours, I'd say.

Q. Now, I'd like you to try to recall the third time or the next time that you saw Big Foot, or Bob, would that have been on July 18th?

A. Yes.

Q. Of 1975?

A. Yes.

Q. All right, would you tell us about how long you were in Big Foot's presence that day?

A. About ten minutes.

Q. And was Victor with you on that day?

A. Yes, he was.

Q. And was he with Big Foot or Bob about ten minutes on that day as well?

A. Yes.

Q. And that was during the day?

A. 3:00 o'clock.

Q. And did they talk to each other?

A. Yes.

MISS JACOBSEN: I have no further questions.

MR. WEINBERG: Just a few.

CROSS EXAMINATION BY MR. WEINBERG:

Q. You don't have a real good memory of July of 1975, do you, Mr. Perkins?

A. Not real good.

Q. Okay, was July 18, 1975, the last time you saw this man Big Foot?

A. Yes, it is.

Q. You haven't seen him today, have you?

A. I haven't seen him when?

Q. You haven't seen this man you knew as Big Foot today, have you?

A. No.

MR. WEINBERG: No other questions.

THE COURT: Anything further?

REDIRECT EXAMINATION BY MISS JACOBSEN:

Q. Richard, I'd like to ask you to look around the court room very carefully. First of all, while you are doing that, were you looking to see Big Foot today any where?

A. Was I looking to see-- yes I was.

Q. And can you look around the courtroom?

A. Yes.

Q. All right, do you see that person any where that you know as Bob or "Big Foot?", or anyone that looks like him?

MR. WEINBERG: I object, Your Honor, to the second part of the question, "Looks like him."

THE COURT: We will allow the question.

A. I see a few people that resemble that person.

Q. All right, Richard, when shortly after you were arrested, did you have an interview with an agent, Handoga?

A. Yes.

Q. And at that time did you give a description to agent Handoga of the person that you knew as, "Big Foot" or Bob?

A. Yes, I did.

Q. Do you recall that description?

A. Of about 6-foot 2" or so built man, very large, weighing about 220 pounds or so, and very light blond hair--very short blond hair.

Q. Was that about it?

A. Well, just a large feature. Just a large, huge guy.

Q. Do you remember if you told agent Handoga anything about the fact that Big Foot had a beard?

A. No.

Q. Do you recall if Big Foot did have a beard on July 18, 1975?

A. I really don't remember if that day he did or didn't

Q. All right now, I'd like you....

THE COURT: Miss Jacoben, your voice is very low-key. I think if you stood by the podium and talked into the michrophone it might be easier to hear you.

MISS JACOBSEN: Sorry, Your Honor.

Q. Now, Richard, you said you looked around and you saw several people here that resembled the person that you knew as "Big Foot" or Bob. Could you point out those people, please?

A. Yes. There is a gentleman with a turtle-neck that I - I think if he had blond hair and was a little bigger, he could pass for " Big Foot."

Q. All right, is there anyone else there that you see....

MR. WEINBERG: Your Honor, may the record indicate the name of this gnetleman?

THE COURT: Yes.

MR. CANTANZARO: Would you tell the Court your name, please?

MR. DEVIDO: Yes, Michael DeVido.

THE COURT: What was the name?

MR. DEVIDO: Michael DeVido, Your Honor.

MR. WEINBERG: How do you spell that?

MR. DEVIDO: Capital D-e, Capital V-i-d-o.

MR. WEINBERG: DeVido, Your Honor.

MR. WEINBERG: Sit down, Mr. DeVido.

Q. Is there anyone else, Richard, that resembles " Big Foot?"

A. Yes. The gentleman with the suit and tie on.

Q. What is the color is the suit?

A. Blue. The second gentleman in.

Q. All right. Would you take a good look at him and tell me if you think this person also resembles "Big Foot?"

A. He was--it seems that he was bigger--with something like that gentleman that--I think I'd it if that was the guy.

Q. All right. Let the record reflect that Mr. Perkins has selected Mr. Marchand.

THE COURT: The record may so show.

Q. Are there any other people that you see that resemble, "Big-Foot?"

A. He had hair like--kind of like that gentleman in the green suit.

MR. OTERI: May the record indicate that the gentleman referred to is my co-counsel, Mr. White, Richard White.

THE COURT: Go ahead.

Q. Anyone else, Richard?

A. No--no.

Q. All right now, are there any specific characteristics about these three people that you have chosen that fit with the description you have in your mind of, "Big Foot?"

A. Well, I've been giving a lot of thought to it and I remember him as an abnormally--he didn't look like a regular person--he was just a huge like--I just remember him like a real hulking type of individual like huge eyes and huge nose, huge hands, huge everything.

Q. Were you frightened of this person?

A. No, not really. I didn't spend much time with him to be scared of him.

Q. Your impression of him, generally, is of someone big?

A. Right.

Q. And that was the description you gave agen HANDOGA?

A. Right.

Q. And that he was tall, broad shouldered?

A. Right.

Q. Thank you. I have nothing further at this point, Your Honor.

CROSS EXAMINATION BY MR. OTERI:

Q. Were any of these individuals huge?

A. No. They were large but not as big in proportion as I remember.

Q. All three of them resemble, in one form or another, the person you remember as, "Big Foot?"

A. In certain ways each one has certain characteristics that are....

Q. Are any of the three, "Big Foot?"

A. No.

Q. No other questions.

REDIRECT EXAMINATION BY MISS JACOBSEN:

Q. Richard, do you remember if Big Foot was wearing glasses at the time?

A. On the 18th? Q. Yes.

Q. Can you....

A. I really don't know. He could have been wearing sunglasses or--or I don't remember.

Q. Do you at any time after you spoke to agent Handoga, draw a picture of "Big Foot?"

A. Yes, I did.

Q. And, do you remember seeing that picture in October when you testified?

A. Yes, I do.

Q. And, do you remember testifying at that time that you were trying to draw a picture of, "Big Foot?"

A. Uh, I don't remember.

Q. Were you, in fact, trying to draw a picture of "Big Foot" when you did that sketch?

A. Yes, I was.

Q. All right. And, did you say that you were trying to make it as accurate as you could, at that time?

A. Yes, I was.

Q. All right. And I would like to show you what has been marked as Government's Exhibit #7 for identification. Can you identify that?

A. Yes I can.

Q. Can you tell us what it is, please?

A. It's a drawing I made some time ago.

Q. Whom was that a picture of?

A. That was a picture of, "Big Foot"--the guy that you saw.

Q. Okay, I would like to offer this into evidence.

MR. WEINBERG: Objection.

THE COURT: You may state your objection.

MR. WEINBERG: Thank you. Firstly,-- the first reason is the prior identification is not authorized by the federal rules; secondly, the man has stated that the man is not "BEghFoot" -- or that Robert Marchand is not "Big Foot"; therefore, the pictures are not relevant in this proceedings.

THE COURT: Objection, over-ruled. Government's Exhibit #7 may be received.

MISS JACOBESN: Thank You, Your Honor.

Q. Now, I would like you to look at this sketch and in that sketch that you made of " Big Foot" -- when did you make that, do you remember?

A. I do not remember. I think it was like a couple of months-- no, well, a couple of months after I got arrested.

Q. And you got arrested in July of '75, so that would be maybe September of 1975?

A. Uh-um.

Q. Now in that sketch, does "Big Foot" have glasses on?

A. No.

Q. In that sketch, does "Big Foot" have a beard?

A. No.

Q. All right. I would like to-- never mind, I'll withdraw that question. No further questions, Your Honor.

RECROSS OF MR. PERKINS BY MR. WEINBERG:

Q. You had never met Marchand in July of 1975, had you?

A. Pardon?

Q. You never met ROBERT MARCHAND in July of 1975, had you?

A. Huh?

Q. You had never met MR. MARCHAND in July of 1975, had you?

A. No.

Q. So you don't know whether ROBERT MARCHAND had glasses and a beard in 1975, do you?

A. No.

Q. MR. MARCHAND, would you stand up and take your glasses off? Will the record state that MR. MARCHAND is standing with his glasses off?

A. No, I don't thing that its....

Q. And you think you would remember "Big Foot" if you saw him here in person, is that right?

A. I--I don't know. I think if you stand him right there, and it was the guy, I would probably remember.

Q. Thank you, MR. PERKINS.

MS. JACOBSEN: No further questions, Your Honor.

MR. WEINBERG: No further questions.

THE COURT: Does the Government have anything further to add?

MS. JACOBSEN: No, Your Honor, we have nothing further. Your Honor, we have no other witnesses to present at this time.

THE COURT: Very well. The Court will recess at this time until 9:30 tomorrow morning.

SECOND DAY - MORNING SESSION (1/6/77)

WITHOUT JURY (9:35 a.m.)

THE COURT: The Government will be heard first. I take it that the defendant has a copy of this motion? Has the defendant had an opportunity to see the motion?

MR. CANTANZARO: Yes, Your Honor.

THE COURT: Do you wish to be heard in support of that motion?

MR. HUGHES: Your Honor, I rely on my motion pursuant to 18 U.S. Section 1606, that the judgment of MR. COOK--testimony of MR. ROY is necessary in public interest and that he has refused to testify in court. We are relying upon TWIX from the Attorney General which is attached to the motion which states that the original letter will be mailed within two days. We believe that it is the Court's descretion to rely on this TWIX and we believe this is good authorization in this case.

MR. CANTANZARO: Your Honor, if I may be heard?

THE COURT: Yes.

MR. CANTANZARO: I have a copy of the TWIX in front of me also. I would like to say that I do have certain problems with it. Initially, I would like to call the Court's attention to the case of URASKI versus United States District Court of the District of California, 504 F, Second, 513. In that case, the Ninth Circuit said that in passing upon an immunity application, the District Court is confined to an examination of the application and the documents accompanying it for the purpose of only deciding whether or not the application meets the procedural requirements of the authorizing statute. I think, Your Honor, that the United Circuit was pointing out here that before a District Court can pass upon or grant an immunity, it is incumbent upon the Court to make an examination of the documentation to see that it fulfills the requirements of the statue. Now, my concern is simply this: If MR. ROY takes the stand today, and is ordered to testify, in two months from now or two years from now, whatever the case may be, if the prosecution decides that something he said was worthy of prosecution, or requires prosecution and they can look back and say, "Well, that judge gave that immunity and it was based upon a TWIX and that is not really the kind of documentation that is necessary."

I want to bring that to the Court's attention because that is my concern on behalf of MR. ROY. I do think that the Government is acting in good faith, but I don't know if good faith is sufficient in these circumstances. It is a constitutional privilege that we are confronted with and I think that the proper documentation in the forms that are prescribed by the statute and that the Attorney General would send up here is required.

MR. HUGHES: Your Honor, the Government contends that the TWIX in this case is certainly good enough, of course, in the discretion of the Court. This letter will be mailed within the due two business days and it will be presented to the Court. If nothing else, it will be a stop if followed through. I'm saying that we will, with the letter, from using any of this testimony.

THE COURT: The Court will say that before I arrived in chambers this morning, the telephone communication from the Department of Justice because the T-W-I-X mechanism didn't start until 9:15 and this call was made prior to 9:15 which confirms the statement that one wanted to inform the Court that authority had been duly granted by the Department of Justice under the provisions of Section 6003-B. The Court will grant the motion and I will sign the order. The Government may proceed.

MS. JACOBSEN: Your Honor, we would request, at this time, a very brief recess, five minutes and no more, just to talk to MR. WARD. We have not had any opportunity to talk to him up until this time due to his constitutional problems in refusing to testify.

MR. CATANZARO: May I understand that the Court is going to issue the order of immunity and, as I understand it, before that becomes valid, he must be read by Your Honor exactly what that immunity is. I believe that that is the practice that he is to be told in Court the extent and the scope of the immunity and before I can advise him to speak to the Unites States Attorney, I would have to advise him that he entitled to that.

THE COURT: We will say, MR. ROY, in the

presence of your counsel that the Government has requested that you be granted immunity under the provisions of Title 18 of the United States Code 6002 and Section 6003. The Government had made a proper showing for the Court to grant you immunity and the Court has signed the order that was proposed under the provisions of the statute which means that the Government can not--that you are immune from prosecution for any testimony that you might offer in connection with the present proceedings.

The Court, also, finds that there is no danger of, in view of the papers presented to the Court and the appropriate law of the Unites States, has pronounced by the United States Supreme Court that there is no danger of your being prosecuted under statutes of the State of Vermont that may relate to this same subject matter. Accordingly, you will be required to testify concerning relative material and relevant questions and to answer relevant questions that may be presented by the United States directed to you.

If you fail to answer those questions which the Court may rule upon being relevant, you are subject to being held in contempt of Court. That in turn, if the Court should so find that your conduct is contemptuous, you could be held in contempt and subject to the penalty provided by the laws of the United States in that regard. The penalty may include a term of imprisonment.

The Court will afford you an opportunity to consult with your counsel before consulting with the Unites States Attorney or before proceeding with the hearing that the Court now has under consideration.

MR. CATANZARO: If Your Honor please, I assume that the immunity also covers questions of the defendant asks, as well as the Government asks him?

THE COURT: Pardon?

MR. CATANZARO: Your Honor stated that immunity would be for questions propounded by the Government and I also assume that includes the Defendant's questions?

THE COURT: Yes, certainly. The Government will ask him questions in the first instance and he will be subject to cross-examination by counsel for the defendant and immunity would also extend to questions that might be asked by Defendant's counsel that relate to the same subject matter.

MR. CATANZARO: We would object to the granting of immunity based on these papers and any recess on the grounds that, although immunity covers testimony, it doesn't cover prior statements to the United States Attorney. It doesn't seem to me that the Statute 6001 is the basis for a request for a recess.

THE COURT: We will note your position on the record.

MR. HUGHES: Your Honor, this immunity, of course, is only for testimony and not for personal use.

THE COURT: Yes, the immunity doesn't cover any false statements that is knowingly given. If you testify under the grant of immunity and make a statement that is false, you could be prosecuted for perjury. The immunity does not extend as to perjury and you are advised so. I believe that you have received that advise in the prior proceedings but you should understand it now and I'm sure your counsel will advise you to that effect.

The Court will take a recess until 10:00.

(The Court recessed until 10:11 a.m .)

CONTINUED WITHOUT JURY

THE COURT: The Government may proceed.

MISS JACOBSON: Government calls Victor ROY.

VICTOR ROY, having been recalled as a witness by the Government was duly warned that he was still under oath and testified further on his oath as follows:

DIRECT EXAMINATION BY MISS JACOBSON:

Q. Mr. Roy, where are you living now?

A. I am going to have to use my Fifth Amendment right at this point.

MR. CANTANZARO: Your Honor, if I may understand that for the immunity to come into effect, he has to exercise the Fifth and then be granted the immunity. That is why I advised him to take the Fifth upon asking that question.

MR. HUGHES: That is the Government's understanding also, Your Honor.

THE COURT: The Court will state to you and I believe that your counsel has a copy of the Court's order that grants you immunity from Federal prosecution concerning the subject matter of the present inquiry that is advanced by the

Government. The Court has also found that and has made a determination that the immunity, as far as state prosecutions are concerned is extensive with the federal immunity that is granted and accordingly you will be called upon to answer the appropriate inquiries by the Government in this regard under the possibility--failure to do so might well subject you to being held guilty of contempt of this Court.

MS. JACOBSEN: May I proceed, Your Honor?

THE COURT: Yes.

DIRECT EXAMINATION CONTINUED BY MRS. JACOBSEN:

Q. All right, Mr. Roy, will you tell us where you are living now?

A. Where I'm living now?

Q. Right.

A. I'm living in Dillon Colorado.

THE COURT: Denver?

A. Dillon, as in Marshal Matt.

Q. And in July of 1975, where were you living?

A. My address was Box 524, Moretown, Vermont.

Q. All right, were you living in the same house as Richard Perkins, at that time?

A. I was.

Q. All right, and were you involved in a marijuana transaction on July 18, of 1975 in Brattleboro, Vermont?

A. In Brattleboro, Vermont--yes I was.

Q. On that day, did you meet with two men in Brattleboro, Vermont?

A. Yes, I did.

Q. And did those two men supply you and Richard Perkins with about 180 pounds of marijuana?

A. Yes.

Q. And were you subsequently arrested for attempting to distribute that marijuana in Burlington, Vermont?

A. Pardon me?

Q. Were you subsequently arrested for attempting to distribute that same marijuana in South Burlington, Vermont?

A. Yes.

Q. Of the two men who gave you that marijuana in Brattleboro, was one of them known to you as Bob or Big Foot?

A. Yes.

Q. Would you tell us please how the meeting was arranged in Brattleboro?

A. How the meeting was arranged?

Q. Yes. How did you all decide to get together in Brattleboro?

A. Well, that was a convenient location, since Big Foot was from the, I guess the Southern Vermont area and we arranged to meet there.

Q. My question was, "How you arranged to meet there," did you arrange to meet by letter, did you make telephone calls, how did you make the arrangement?

A. We made some telephone calls.

Q. Would you tell us what time of day it was when you got together, as best as you can recall?

A. I would say it was in the morning, maybe. The end of the morning.

Q. Late morning?

A. I think it was probably late morning.

Q. Where was it that when you first met with these two men?

A. Where was it when I first met with these two men?

Q. Right, can you give us exactly where the location was in Brattleboro?

A. I think it was near the Howard Johnsons in a rest area.

Q. What happened, did you arrive first or were these other men there when you got there?

A. Let me think, now. I think maybe we arrived first.

Q. Now, when you say, "we," are you referring to yourself and Richard Perkins?

A. Yes.

Q. You drove down there together?

A. Yes.

Q. You arrived first. About how long were you waiting until these other people got there.

A. I really can't remember too well. Not too long, I don't think, maybe a half an hour or so.

Q. Do you remember having to wait, though, until they arrived?

A. Well, I think there was a waiting period.

Q. Did you do anything during that time while you were waiting?

A. Had something to eat.

Q. Do you remember--excuse me.

A. Had a cup of coffee.

Q. Do you remember making any telephone calls?

A. Yes, I made some telephone calls.

Q. Do you remember the number you called?

A. No.

Q. After you met, when these other two men drove up, what happened at that point? Did you stay where you were or did you arrange to go somewhere else?

A. Ya, we took off to this rest area.

THE COURT: I didn't get the last answer.

A. We took off to this turn-off.

Q. Did you drive there?

A. Yes.

Q. In two separate cars?

A. I don't think I drove.

Q. Were you in a car, though?

A. Yes.

Q. Mr. Perkins was driving?

A. Yes.

Q. Did the other two gentlemen drive there as well?

A. Yes.

Q. What happened when you got there?

A. Well, when we got there, the marijuana was transferred to our car.

Q. Did you get out of the car that you had been in?

A. Yes.

Q. Did you have any conversations with these two people that were giving you the marijuana?

A. Yes.

Q. Were you standing fairly close to them?

A. Well, kind of moving around busily--not really standing.

Q. How close did you come to these people? Within five feet, ten feet, what would you estimate?

A. Oh, I really can't say how close. Probably, you know, it was, as you realize, a rush occasion. I mean we weren't standing around enjoying the sunshine, so....

Q. Well, how long do you think you were there?

A. Not very long.

Q. Estimate. Five minutes, ten minutes, what do you think?

A. Two minutes.

Q. Mr. Roy, think about it. It would take at least....

MR. WEINBERG: I object, Your Honor. The objection is that the man has given his answer.

THE COURT: Objection, over-ruled. We will allow the Government to proceed.

MS. JACOBSEN: Thank you, Your Honor.

Q. I would like you to think about that answer, Mr. Roy, and how many people were involved. How much marijuana were they transferring from their car to your car?

A. 180 pounds.

Q. Were they in big packages or little packages?

A. Big.

Q. Do you remember how many big packages there were?

A. I believe there was four.

Q. Did they have to open their trunk before they could take it out or was it already opened?

A. I really don't know.

Q. Do you remember if the trunk of your car was opened?

A. Well, with the key.

Q. So somebody had to take a key out and open it up, is that right?

A. That's right.

Q. Did anything have to be removed from the trunk of the car you were in before the marijuana could be put in?

A. Yes, it definitely took up the whole trunk so that the spare tire and things like that had to be removed from the car.

Q. And, were there any separate objects that had to be removed?

A. I don't remember.

Q. Would you testify that it would take several minutes to remove the things from one trunk and carry things from another trunk to put in.

A. Would I testify....

MR. WEINBERG: Objection, Your Honor. It has been asked and answered.

THE COURT: We will allow one COunsel to entertain objections. MR. WEINBERG has started, so he should voice any objections that the Defendant has as far as this witness is concerned.

Q. About how long do you think that would take, Mr. Roy.

A. Not very long.

Q. Do you think it would take longer than two minutes, though?

A. I don't, I don't--not if you are fast.

Q. Let's refer to this person, Big Foot or Bob. Did you know him by both names?

A. Yes, I knew him by both names. Big Foot or Bob.

Q. Was that the first time you had ever seen him?

A. No, it wasn't.

Q. How many times had you seen him before?

A. I really can't say, exactly. A number of times, not that many times but....

Q. Would it be fair to say that you had know him over a long period of time or a short period of time?

MR. WEINBERG: Objection, Your Honor.

THE COURT: Objection, over-ruled.

A. Short period of time, a ways back.

Q. When you say, "a ways back," would you explain that, please?

A. I had know him from previous friends.

Q. Well, that does not explain in terms of time what "a ways back" mean. Does that mean that you had know him from several months back or from several years back or days. Would you clarify that, please?

A. Years back, but not continuously for years.

Q. You met this person some years ago, you had contacts with him. Did you lose contact with him at some time?

A. Yes. I wasn't always in contact.

Q. And then did you, at some time after that renew your contact with him and see him again?

A. Yes.

Q. So that over a period of several years, you would see this person once or twice a year or occasionally?

A. Ya. He was a friend, you know.

Q. Would you give us a description, please, of this person? Be as specific as you can, regarding his height, weight, coloring, things like that.

A. Okay. He was a big person.

Q. How big?

A. Over six-feet tall. I'd say, broad shoulders, kind of lightish hair, that's all--I can't, you know, I'm not that good at discriptions, obviously.

Q. Do you know what color his eyes were?

A. No.

Q. Think about his features. Is there anything that stands out or does he give you the impression of being a big person or a thin person, or heavy set? What would you say about that?

A. Just gives me the impression of being a big person.

Q. How old would you say that person is?

A. In the 20's.

Q. When did you testify before the Grand Jury?

A. The afternoon of July 1st, 1976.

Q. Before that time, you had seen this person, Bob or Big Foot, over a period of years at least several times. Would say four times before that?

A. I can't really say or put a number on it.

Q. Would you say that you have seen him at least four times before that? Can you answer that question?

A. That's really defining it, you know, I can't really agree with the number, you know.

Q. That's setting a minimum.

A. Oh.

Q. That doesn't mean that is the definite number you have seen him. I am asking you to say if you think you have seen him at least that many times?

A. I think maybe.

Q. Each time you saw him, did you spend at least several minutes with him?

A. Yes, I would say.

Q. Did you ever have an occasion to ride in a car with him?

A. I really can't remember now. I might have had an occasion.

Q. Do you recall any other occasions prior to July 18, 1975 when you obtained marijuana from this person?

A. Do I recall any other occasions?

Q. Yes.

A. Yes.

Q. On any of those occasions, did you get into a car with Bob and drive away to pick up the marijuana that you were getting?

A. I think, maybe.

Q. And about how long would you say that excursion took you?

A. Oh, let me think now. I can't really put a time on it but it was a distance.

Q. So, it took you more than two minutes?

A. Uh huh.

Q. Would you say it took you about an hour?

A. I can't really remember, you know, the exact time but, you know, it was some time.

Q. It was some time.

A. Uh huh.

Q. And it was a long distance that you drove?

A. Well, I wouldn't say a long distance. I really can't remember the distance but....

Q. All right. So that you have, Mr. Roy, had opportunity to observe this person on several occasions?

A. On a few occasions.

Q. I have no further questions, Your Honor.

CROSS EXAMINATION OF MR. ROY BY MR. OTTERI:

Q. Mr. Roy, would you look around the courtroom and tell me if you see anybody here who resembles or looks like the person, this Big Foot or Bob?

A. Resembles?

Q. Yes. Looks like, you know, big guy, broad shoulders, looks like. ..

A. Well, there's a couple of guys with broad shoulders here.

Q. Would you point them out for us, please?

A. Well, you are a big guy with broad shoulders. That gentleman sitting over there is a big guy with broad shoulders.

Q. Which one is that, the fellow on the end of the bench?

A. On the left--on my left.

Q. Stand up, please. Is this the fellow you mean?

Q. This fellow?

A. Yes.

Q. Mr. DeVito. Anyone else?

A. I would say, you know, the cut of the suit and kind of doesn't really help, but I would say maybe the guy next to him.

Q. Stand up, Mr. Marchand. Anyone else?

A. This gentleman sitting right here has broad shoulders.

Q. Stand up, please. For the record, would you state your name and position.

MR. HUGHES: My name is JOHN HUGHES, Jr. I am an assistant U.S. Attorney and I'm not over six-feet tall.

A. Well, he said broad shoulders, okay?

Q. Now let me ask you,--you may sit down Mr. DeVito. Do you see here today the man who gave you the grass in court? The man, Big Foot, Bob, is he here?

A. I don't see anyone here who resembles him.

Q. Is he here? Do you see him?

A. No.

Q. Marchand, stand up. Is that him?

A. He doesn't look like Big Foot.

Q. Thank you. No further questions.

MRS. JACOBSEN: Your Honor, may we approach the bench for a moment?

THE COURT: Yes.

MS. JACOBSEN: Your Honor, the only reason I came up here is because I wasn't sure if Mr. Roy should hear

A. 270.

this. We would request permission to cross-examine him now as a hostile witness and impeach him with his Grand Jury testimony.

THE COURT: You may do so.

MR. OTTERI: Objection, Your Honor. This is not based on this part of the Grand Jury testimony relating to photographic identifications excluded by this Court.

THE COURT: We will allow it.

MRS. JACOBSEN: May we go into that identification?

THE COURT: You may.

MR. OTTERI: Photographic Identifications?

THE COURT: Yes.

MR. OTTERI: Okay, may we note our objections?

THE COURT: Surely.

(BENCH CONVERSATION CONCLUDED)

CROSS EXAMINATION OF MR. ROY BY MRS. JACOBSEN:

Q. Mr. Roy, do you recall testifying before a Grand Jury in Burlington, Vermont on July 1st, 1976?

A. Yes, I do.

Q. Do you recall being asked this question and giving this answer?

"Question: Now, whom was the individual whom you obtained the 180 pounds from that you participated in the delivery of on July 18? How do you know him? How did you know, by what name?"

"Answer; I knew him as 'Big Foot' or Bob, I didn't know any last name."

"Question: When was it when you first met Big Foot or Bob?" "Answer: I met him years ago in the Amherst area, Amherst, Massachusetts."

Q. Do you remember being asked those questions and giving those answers?

A. Yes, I do.

Q. Do you remember being asked this question and giving this answer?

"Have you seen him continually thereafter or was there a point in time when you lost contact?" "Answer: Oh, I had lost contact with him. I hadn't seen him for a number of years and then recently had seen him down in the Brattleboro area, happened upon him."

Mr. WEINBERG: I object. May I state my reason for the objection?

THE COURT: Yes. Now, the Court has indicated that we will allow one counsel from the team of defendant's to make objections. The Court permitted Mr. Otteri to interpose an objection and to conduct a cross-examination of this witness. The Court will allow you or Mr. Otteri, but not both.

MR. OTTERI: I'm sorry, Your Honor. We were confused. You had said earlier--we got caught up earlier. He took the objection, so I haven't been letting him take it. I was supposed to cross-examine the witness, that's why I didn't object.

MR: WEINBERG: The objection is that there is nothing inconsistent with what has been read, so it is irrelevant.

THE COURT: The objection is over-ruled, you may proceed.

MRS. JACOBSEN: Thank you, Your Honor.

Q. All right, Mr. Roy, do you remember being asked this question and giving this answer?

"Question; Was there a point in time when you and an individual by the name of Richard Perkins did get in touch with this individual you knew as Bob?"

"Answer; Yes. Question; How did you get in tough with him? Answer: He had given me a telephone number I could use if I ever wanted to get in touch with him, I could call him on the phone. Question: You were able to call him down there? Answer: I got--yes. Question: When you first met him on that occasion in Brattleboro, did he have a female associate or person with him? Answer: There was a girl with him, yes. Question: Do you recall what her name was or part of the name you got? Answer: I think Ann. Question: Did you have an occasion thereafter, from time to time, to call this telephone number that you have indicated that you were given? Answer: A few times we did, yes. Question: And in addition to speaking to an individual named Bob, did you speak with anyone else there you knew by name? Answer: Well, a girl talked on the phone and there was no name or anything but it was a girl--can't mistake the voice. Question: Did the voice sound similar to that of the person with whom you had heard speak on the first occasion when you met with Bob? Answer: It's hard to say over the phone. When I first met Bob it was a loud sort of a, what would you call it, a nightclub and I didn't talk to the girl there, so it's hard for me to say. Question: Did you after you first meeting with Bob in Brattleboro, after you had run across him, did you have occasion, along with Mr. Perkins to purchase marijuana from him? Answer: Yes, we did. Question: Where did the transaction take place? Answer: In Springfield, Vermont. Question: Approximately how much was involved? Answer: One of two times, it was about ten pounds and another time it was about 20. Question: There was occasion, was there not, when you purchased 180 pounds from him, is that right? I should have said 'obtained' 180. Answer: Obtained 180 pounds. Question: Where did you obtain the 180 pounds? Answer: We went down to the Howard Johnson's in Brattleboro just over the New Hampshire boarder. I don't know what route it is, Route 5 I think, maybe and we met him there and he had it with him and we went around to a little rest area and he threw it into the trunk of our car. Question: Was there someone else with him? Answer: There was another person with him. Question: Do you know what the name of that person was. Answer: No idea, I didn't have a good look at him. I have no idea who he was or whatever. Question: Thereafter, you and Mr. Perkins brought the 100 pounds up north and were arrested when you delivered it to someone you learned to be a D.E.A. agent? ANSWER: That is correct. Question: Special agent, SANDOGA, of the Drug Enforcement Administration this morning show you a series of photographs and ask if you recognize one of the individuals in that group? Answer: Yes, he did. Question: You picked out one of the photos, is that right? Answer: Right. Question: Did you also pick out another photo as being the person whom you believe to be the person by the name of the person you met on the first occasion with Bob in Brattleboro? Answer: Right. It looked--the photographs weren't, you know, they were old photographs but they looked the same. Question: They looked like the same persons. Answer: Uh hum."

Q. Do you remember giving that testimony, Mr. Roy?

MR. WEINBERG: I object for several reasons. May I state them?

THE COURT: Yes.

MR. WEINBERG: The first one is that the last question was that they looked like basically the same persons, person I should say. That was omitted from the question. Secondly, the question was a speach. Thirdly, the question in the most extent was not a prior inconsistency.

The Fourth one because the last couple of questions were excluded by this Court after a motion to suppress claimed the procedures unreliable. For all those reasons I object.

THE COURT: The Court will allow the witness to read the Grand Jury minutes and the Court will state on the record that the, at the time the Court excluded the photographs and the motion to suppress, the testimony of the witness was precluded by his Fifth Amendment privilege that was asserted at the time of the hearing and the Court, the Government had no opportunity to explore this matter in depth.

MR. WEINBERG: May I be heard briefly. What the Court excluded was not the in-court identification. The Court granted the Government leave to see if they could procure that. The Court excluded on the foundation.

THE COURT: The Court has made a ruling and we will allow the Government to inquire regarding this particular subject matter.

MR. WEINBERG: My specific objection is to the photographic identification.

THE COURT: We'll note that.

MISS JACOBSEN: I don't think any answer has been given.

Q. Have you read it now, Mr. Roy?

A. Yes, I have.

Q. All right now, do you recall now giving that testimony?

A. Yes, I do.

Q. And was that testimony true when you gave it?

A. Well, I don't think so.

Q. What do you mean, you don't think so, are you tell us now you lied to the grand jury, Mr. Roy?

A. Well I, - those weren't all true statements as far as the photographic display and all that.

Q. So that your statements when you identified the photograph - well why don't we put it in? I'd like to show you Government's Exhibit #12 for identification, do you recognize that photograph?

A. I recognize the photograph.

Q. Is that the photograph that you picked out of the series that you were shown by Agent HANDOGA?

MR. WEINBERG: I object.

THE COURT: Objection over-ruled, proceed.

A. Well my initials are down in the corner here.

Q. Is there anything else down in the corner there?

A. The date.

Q. And what's the date?

A. 7-1-76.

Q. And is that the picture that you chose from the series shown to you by Agent HANDOGA?

MR. WEINBERG: I object.

THE COURT: Objection over-ruled.

A. That's, - that's the picture.

Q. And is that the picture that you identified as the supplier of marijuana?

MR. WEINBERG: Objection.

THE COURT: Objection over-ruled.

A. That's the picture that I picked out as someone I had recognized.

Q. And you were trying to find the supplier of marijuana at that time, isn't that correct?

MR. WEINBERG: Objection, Your Honor and may I have a continuing objection so I won't have to get up?

THE COURT: Yes, we'll allow the Government to cross-examine in some depth in this matter.

MISS JACOBSEN: Thank you, Your Honor.

(Last question read by the reporter)

A. That was, - I think that was the point of the whole thing there.

Q . That was the point of your being interviewed by Agent HANDOGA and the point of his showing you the pictures that he showed you?

A. As I understood it.

Q. And this is the picture that you selected as the one that you recognized?

A. That is the - I recognized the person in the picture.

Q. All right, I'd like the record to reflect that this is a picture of the defendant, ROBERT MARCHAND.

May I have a minute, Your Honor?

A. Yes.

Q. All right, Mr. Roy, you said that this is a picture that you selected as one that you recognized, is that correct?

A. That's right.

Q. And that's while you were trying to establish who the person that supplied you with the marijuana was, is that correct?

A. What was that again?

Q. When you picked out this picture as someone you recognized,

A. Right.

Q. - that was while you were looking at a series of pictures to try to identify your supplier, is that correct?

A. Yes.

Q. All right and then subsequent to the time that you selected this picture of ROBERT MARCHAND, you testified before the Grand Jury, is that correct?

A. After - after that, yes.

Q. And when you testified before the Grand Jury, was your testimony directed at identifying the person who had supplied you with marijuana?

A. The testimony was directed and, - what was that agaiN? Let me get this straight.

Q . Was the point of your testimony before the Grand Jury, to identify the person who supplied you with marijuana?

A. That was the purpose of the Grand Jury.

Q. And when you were asked in the Grand Jury whether Special Agent HANDOGA had showed you a series of pictures and whether you had selected a picture, was that question directed at identifying the person who supplied you with marijuana?

A. I believe so.

Q. And you answered to that question: "Yes, he did." In other words, AGent HANDOGA did show you the picture?

A. Yes.

Q. The next question: "You picked out one of the photographs is that right?" Answer: "Right." Do you remember being asked that question and giving that answer?

A. Yes.

Q. And was that question directed at trying to identify the person who supplied you with the marijuana?

A. I believe so.

Q. And when you were asked in the Grand Jury, question: "They looked like basically the same persons, person I should say," and you answered: "Uh huh." That was also directed at identifying the same person who had supplied you with the marijuana, is that correct?

A. What was that again?

Q. The question was, referring to the photographs that you selected, "It looked like basically the same persons, person, I should say?" Answer, "Uh huh." Was that what, that question, also aimed at identifying the persons who had supplied you with marijuana?

A. Was the question, - the question was aimed at identifying the persons who had supplied me with marijuana?

Q. Yes. Is that correct?

A. Yes.

Q. And this photograph of ROBERT MARCHAND is the picture that you were referring to in that Grand Jury testimony, is that correct?

A. That's the only picture with my initials on it.

Q. And so you identified to the Grand Jury that you selected a picture of the person who supplied you with marijuana, is that correct?

A. Did I identify the picture that looked to me like the person who supplied me with marijuana?

Q. I have no further questions, Your Honor.

RECROSS EXAMINATION BY MR. OTTERI:

Q. Mr. Roy, directing you back to July first, -

THE COURT: Now, Mr. Weinberg is to conduct this cross-examination. He's made all the objections and we are going to have only one counsel conduct the examination.

RECROSS EXAMINATION BY MR. WEINBERG:

Q. Mr. Roy, taking you back to July first, 1976, you appeared in Brattleboro, Vermont that day, I'm sorry, in Burlington, Vermont?

A. On July first, '76, Burlington, Vermont.

Q. Right, that was pursuant to a subpoena?

A. Yes.

Q. In answer to a subpoena?

A. Yes.

Q. You were interviewed, were you not?

A. Yes, I was.

Q. By Agent HANDOGA?

A. Yes

A. 281.

Q. You were shown photographs, were you not?

A. Yes.

Q. How did you fell that day when the photographs were being shown?

A. How did I feel?

Q. Yes.

MISS JACOBSEN: Your Honor, I object to this. We've been through this.

THE COURT: Yes, I believe that this was gone over at the time of the special hearing, but we'll allow you to explore the subject further.

A. I felt pretty nervous.

Q. You were shown photographs, is that correct?

A. That's right.

Q. Did you make any selection of photographs the first time you were shown them?

A. I believe I made one selection, yes.

Q. And was that the picture that the Assistant United States Attorney JACOBSEN showed you?

A. No.

Q. Shown pictures the second time?

A. Yes.

Q. Was Government's Exhibit #12 for identification a photograph of Mr. MARCHAND a photograph that you identified the second time?

A. I believe I identified the same photograph again the second time, but it wasn't that one.

Q. That was not this one. That was the third time that you looked at the photographs again?

A. Yes.

Q. Did you see Government's Exhibit #12 for identification in the packet that you were going through?

A. That was in there, yes.

Q. Was it in there the first time, that you went through it?

A. Yes.

Q. Did you go through it a second time?

A. Yes.

Q. Was it in there the second time you went through it?

A. Yes.

Q. Now, when you selected out this picture the third time, did you make a definite identification?

A. No, I just looked kind of strange, vaguely familiar.

Q. Referring you to the Grand Jury testimony, do you recall the question: "Did you also pick out another photo as being the person whom you believed to be the person by the name of and who you met the first occasion with Bob in Brattleboro?" "Right, it looked, the photographs weren't, you know, they were all old photographs but they looked the same." Question: They looked like basically the same persons,person I should say." Answer: "Uh huh". Question, my question now is, were you at that time, making a definite identification of the photograph of Mr. MARCHAND as the person who you saw as "Big Foot"?

A. Was I making a definite, -

Q. Yes.

A. No, I don't think it was a definite, -

Q. So were you simply saying that the photograph resembled or looked something like the person you recalled as "Big Foot"?

A. Well, isn't that what that says, it says, "basically"?

Q. Well what did you mean when you said "basically"? Positive identification that it was the same person or did you mean that of all the pictures, it resembled the person you remembered as "Big Foot'?

A. May I see that?

Q. Sure. Strike that question. When you said the word in the answer, "They looked like basically the same persons," did you intend by the word "basically" to mean that the photos that you selected were Big Foot or the photos you selected out of all the other photos looked most like or resembled most like the man you remembered to be Big Foot?

A. I BELIEVE that's what my answer was, that they looked basically, the same person.

Q. Well, what did you mean by that? Did you mean that they were the same persons, or they most resembled, . .

A. Well, if I had thought that they were the same persons, I probably wouldn't have said what I said, that they were basically the same persons.

Q. So by the word "basically" you were indicating that it was

A.284.

not a definite identification, is that right?

A. Not a definite identification.

Q. Which you indicated out of all the photos that they looked most like "Big Foot" is that right?

A. Yes, looked most like him.

Q. But in fact the photograph of Bob MARCHAND did not reflect the man who was "Big Foot" isn't that right?

A. Did not reflect it.

Q. In other words, BOB MARCHAND is not BIG FOOT?

A. Right.

Q. Answer for the record.

REPORTER: I heard it.

Q. May I have a second, Your Honor?

THE COURT: Yes.

MR. WEINBERG: Thank you, no other questions.

RECROSS EXAMINATION BY MISS JACOBSEN:

Q. Mr. Roy, when you testified before the Grand Jury, were you aware that Mr. O'Neill was attempting to identify the person who supplied you with marijuana?

A. Was I aware of it?

Q. Yes.

A. Yes, I was aware of it.

Q. And were you aware of the fact that all the questions he asked you were directed at that one point to try to identify this person?

A. I think I was aware of it.

Q. All right and when you answered these questions that you picked out a photo and that looked like the same person who supplied you with the marijuana, were you still aware that he was trying to identify your supplier?

A. Yes.

Q. Do you know BOB MARCHAND?

A. Yes, I do.

Q. How long have you known him?

A. Oh, since probably 1972 or so.

Q. When you saw this picture, did you know this was a picture of BOB MARCHAND?

A. It, - that - that's the thing, you know. It didn't look like him, but it looked vaguely familiar.

Q. Well, you've know Mr. MARCHAND since 1972?

A. Right. That picture wasn't taken in 1972.

Q. But you've known Mr. MARCHAND since 1972, haven't you?

A. Yes.

Q. And when you were in the Grand Jury that was 1976, so that's how many years?

A. Four.

Q. Four years. All right, would you say Mr. MARCHAND is a friend of yours?

A. Yes.

Q. And when you made this identification and you testified in the Grand Jury that this was the picture that looked like Big Foot, you were giving them a friend of yours, the name of a friend who you now say is not the man who supplied you with the marijuana?

A. That's right.

Q. Is he a good friend?

A. A friend.

Q. All right then, when you said that this was the picture and you say now that you know that wasn't Big Foot, you were lying to the Grand Jury, weren't you, Mr. Roy?

MR. WEINBERG: Objection.

THE COURT: Objection over-ruled.

A. Well, it wasn't the truth.

Q. Excuse me, I didn't hear you.

A. I said, well, it wasn't the truth.

Q. It wasn't the truth?

A. (Nodded).

Q. That means you were lying, is that right?

A. (No response).

Q. Is that right, Mr. Roy?

A. Uh huh.

MISS JACOBSEN: I have no further questions.

RECROSS EXAMINATION BY MR. WEINBERG:

Q. Mr. Roy, tell us one question, can you tell us why you said the picture of Bob Marchand resembled Big Foot or looked like Big Foot?

A. Well, for one thing, it did resemble and for another thing, I recognize the picture, you know, I mean when the photographs were displayed, I was asked if I could recognize anybody in the series of photographs and I could.

Q. And if the picture in fact resembled Big Foot wasn't Big Foot, you didn't lie, did you?

A. What was that again?

Q. Your attorney asked you a question and you picked out, out of the photos, a photograph, is that right, is that a correct answer, right?

A. That was the truth.

Q. That was the truth that you in fact did pick out one of the photos, did you not?

A. Yes.

Q. Then the question, "Did you also pick out another photo as being the person whom you believe to be the person by the name and whom you met on the first occasion with Bob, ANN in Brattleboro?

A. (Nodding)

Q. That wasn't a lie either, "I picked out a person's picture that resembled,"

A. Yah.

A. Yah.

Q. "They looked like, basically, the same person or persons I should say. Uh huh. The picture looked like Big Foot, did he not"?

A. The picture did, yes.

Q. But it wasn't Big Foot, right?

A. That's right.

Q. So you didn't lie when you said the picture looked like Big Foot or resembled Big Foot, is that right?

A. yes.

Q. Okay, no other questions.

RE-CROSS EXAMINATION BY MISS JACOBSEN:

Q. Mr. Roy, when you were looking through that series of pictures Mr. HANDOGA showed you, did you select out any other pictures?

A. Yes.

Q. I would like to have these marked for identification. I show you Government's Exhibit #13 for identification and do you recognize that picture?

A. Yes.

Q. Is that the other picture that you selected from the photographs that were shown to you?

A. Yes, my initials are down on the corner.

Q. And is the date down on the corner?

A. The date is down on the corner, as well.

Q. Is that person known to you?

A. I know that person.

A.289.

Q. Who is that person?

A. Ann.

Q. You know her as "Ann"?

A. (Nodding)

Q. And is this the person that you referred to in your grand jury testimony on July first, 1976 when you were asked the question: "When you first met him down in Brattleboro on the first occasions, excuse me, down in Brattleboro, did he have a female associate or person with him?" Answer: "There was a girl with him, yes." Do you recall those, that question and that answer?

A. I recall the question, yes.

THE COURT: What page are you referring to?

MISS JACOBSEN: It is on page 4, Your Honor.

Q. And, is that girl that you refer to the same girl as this ANN in the picture you selected?

A. Well, it's, that's the ANN.

Q. It is the same ANN?

A. That's the ANN.

Q. That's the ANN that you saw with Bob, Big Foot, when you met him and that is the same ANN that you selected from the photographs you were shown, is that right?

A. That is the ANN that I picked out.

Q. May I have a minute, Your Honor?

THE COURT: You may.

Q. Mr. ROY, do you know that girl ANN, yourself?

A. Do I know her?

Q. Yah.

A. I know her.

Q. You know her?

A. (Nodding)

Q. How long ago did yo[illegible] her?

A. I don't rememb[illegible] can't honestly say.

Q. Have you known her as long as you have known Bob MARCHAND?

A. I really don't know. I can't really recall, you know, when I first met her.

Q. Have you ever seen her with Bob MARCHAND?

A. Yes.

Q. Do you know where she was living in July of 1975?

A. I don't know, I don't think so. I don't know.

Q. Do you know where Bob MARCHAND was living in July of 1975?

A. Where he was living in Vermont?

Q. Where, in Vermont?

A. I don't really know the name of the town. Southern Vermont.

Q. To your knowledge, were ANN CURTIS and BOB MARCHAND friends?

A. Yes.

Q. Did you know ANN's phone number?

A. Did I know it?

Q. Uh huh.

A. I don't know, I don't know it now, I mean.

Q. But did you know it in July of 1975?

A. In July of 1975? I think so.

Q. Did you ever call it?

A. I think so.

Q. Do you remember what your phone number was in July of 1975?

A. No, that was a few years ago. I really don't.

Q. I'd like to show you Government's Exhibit #8 for identification, can you tell me what that is?

A. Looks like a whole bunch of telephone numbers.

Q. All right now, you have no memory at the present time of what your phone number was, is that right?

A. No, I don't remember what it was, really.

Q. Would it refresh your recollection to see your phone number?

A. I don't know, maybe.

Q. If I could bring your attention to the bottom of the top page and ask you to read that phone number.

A. 496-3175.

Q. Do you recognize that phone number?

A. I, it could be, but I can't say for sure. You know, it's been a long time.

Q. All right, I'd like to bring your attention to the second line at the top of the page where the phone numbers are listed, would you read that phone number, please?

A. Second line?

Q. Right.

A. 802-622 6806.

Q. Is that number familiar to you?

A. Not really familiar. I mean, this has been a long time ago, you know, you have to understand that. You would be more inclined to remember such detailed information than I would.

Q. How many times did you, do you think you might have called ANN?

A. Occasionally. I don't really, I can't really put a number on it.

Q. Do you think you would have called her several times a day?

A. I don't know, it depends on the situation.

Q. Do you ever recall making phone calls to her several times in one day?

A. Let me think now. I don't, you know, this is a long time ago. I can't really say I did a number of times on the same day, two years ago.

Q. Mr. Roy, we understand it is a long time ago, we are asking you to search your memory and do the best you can and see if you can remember ever calling ANN more than once on the same day?

A. Well, to give you an honest answer, that, I really can't recall, you know, I had a tough time getting here, staying up all night, et cetera and you know, this is two years ago.

Q. When you called her you said, depending on what it was all about, you might have called her more than once. What reasons would you call her for?

A. Well, just to, - I don't know, just to say "hello" or try to estabolish something with respect to what I was doing.

Q. So what reason would you have to call her more than once on the same day?

A. I can't really recall calling her more than once on the same day, but you've got it down there in black and white there, so, ...

Q. Mr. Roy, do you know the town that ANN was living in?

A. Like I said, I don't really know that section of Vermont that well.

Q. Do you know if she was living in the same town that Bob MARCHAND was living in?

A. Could be.

Q. Do you know if she was living in the same house that Bob MARCHAND was living in?

A. Could be.

Q. Do you know if they had the same phone number?

A. That could very well be.

Q. So that when you called that number, you could be talking either to ANN or to ROBERT MARCHAND?

A. That is true.

Q. And in fact, Mr. Roy, when you testified before the Grand Jury that you saw ANN with BOB, you were referring to ANN CURTIS and ROBERT MARCHAND, isn't that correct?

A. Pardon me?

Q. When you tesitifed in the Grand Jury that you saw ANN with BOB, you were referring to ANN CURTIS and ROBERT

MARCHAND, is that right?

A. In the Grand Jury when I mentioned the name "Bob", I was referring to ANN and BOB.

Q. And was that BOB, ROBERT MARCHAND?

A. Uh huh.

Q. And that is the Bob that you identified to the Grand Jury as the one who supplied you with marijuana, is that correct?

A. The one who looked similar to the person.

Q. That is not what you said to the Grand Jury, Mr. Roy.

MR. WEINBERG: I object, Your Honor.

THE COURT: Objection is over-ruled.

A. I think it says down there that the photographs looked basically the same.

Q. I'm not referring to the photographs, Mr. Roy, I am referring to your Grand Jury testimony when you were asked "When you first met him in Brattleboro, did he have a female associate or person with him?" Answer: "There was a girl with him, yes." Question: "Do you recall what her name was, or what part of the name you got?" Answer: "I think ANN." And you said you saw ANN with BOB and you just said that that was ROBERT MARCHAND, is that correct?

A. That is what, the way it read in there.

Q. And that is what you said to the Grand Jury?

A. It's down in black and white there.

Q. Were you lying to the Grand Jury when you said that, too?

A. Now wait a minute here, let's go over this line again, okay?

Q. Do you have something or - that you want me to ask you the question again?

A. Yah.

Q. I think it might be better to have them read back.

(LAST QUESTION READ BY THE REPORTER)

A. Can I talk with Angelo, is that possible?

THE COURT: Your attorney?

A. Yah, ~~,~~ is that possible, just for a second?

THE COURT: Well, it may be well for you to talk to him, yes. (11:24 a.m.)

A. Can I step down for a minute?

THE COURT: Yes.

A. (Leaving the witness stand to talk with his counsel over in a corner of the court room)

11:26 a.m. (QUESTION READ BY THE REPORTER)

A. When I said that, too.

Q. Yah, you want me to read the questions from the Grand Jury?

THE COURT: I think it may be better to frame another question, Miss Jacobsen.

Q. Very well, Your Honor. I am referring again to your Grand Jury testimony, Mr. Roy and ask you if you recall these questions and answers: "When you first met him on the first occasion down in Brattleboro, did he have a female associate or person with him?" Answer: "There "was a girl with him, yes." Question: "Do you recall what her name was, or what part of the name you got?" Answer: "I think, ANN". Do you recall those questions and answers?

A. Yes.

Q. Were those questions concerning Big Foot the person who supplied you with marijuana?

A. Those questions were.

Q. And when you answered those questions, you were saying that you had seen ANN with BOB, is that right?

A. Yes.

Q. And the BOB that you were referring to is ROBERT MARCHAND isn't that right?

A. That I had seen on occasion and ANN and BOB together.

Q. And were you lying when you said it to the Grand Jury, that you saw ANN with BOB, referring to ROBERT MARCHAND?

A. I, now let me see, when I saw that I had seen ANN and BOB together, that is not a lie.

Q. But when you were talking to the Grand Jury, you were discussing a person named Big Foot, or Bob, is that right?

A. Uh huh.

Q. And that was the person who supplied you with the marijuana?

A. Yes.

Q. And you selected a photograph of Robert MARCHAND, is that right?

A. I identified a photograph to be ROBERT MARCHAND.

Q. That was the picture that you were referring to in your Grand Jury testimony, is that right?

A. That that looked basically the same, yes.

Q. And you were referring to or the Assistant Mr. O'Neill was referring to that picture when he was questioning you, is that right?

A. Yes.

Q. And that picture was ROBERT MARCHAND, is that right?

A. The picture that I had initialed, was ROBERT MARCHAND.

Q. So, when you talked about Big Foot or BOB and had the picture of ROBERT MARCHAND, were you lying to the Grand Jury by putting those two names together?

A. Well, the picture of ROBERT MARCHAND was not the picture of Big Foot.

Q. That is not what I asked you, Mr. Roy. I want you to answer my question. When you were talking to the Grand Jury about Big Foot and referred to the picture which was of ROBERT MARCHAND, were you lying when you said that they were the same?

MR. WEINBERG: Objection, Your Honor.

THE COURT: Objection over-ruled.

A. If I said they were the same, then that was an untruth.

Q. And you were lying to the Grand Jury?

A. That was an untruth.

Q. Do you see ROBERT MARCHAND here, Mr. Roy?

A. Yes, I do.

Q. Would you point him out, please?

A. This gentleman over there standing up.

Q. All right, let the record show that he has identified the defendant, ROBERT MARCHAND.

THE COURT: It may so show.

Q. Mr. Roy, when you called ANN, any time you called her, was BOB MARCHAND there?

A. Some times.

Q. And did you ever talk to him when you called her?

A. Yes.

Q. Thank you, I have no further questions.

MR. WEINBERG: No questions.

EXAMINATION BY THE COURT:

Q. The last time you saw this person who you refer to as "Big Foot" did he have a beard?

A. I don't recall. I don't recall him having a beard.

Q. Well, did he or did he not have a beard?

A. NO, like I said, I don't recall it.

Q. YOu don't recall that he did or you don't recall that he didn't?

A. I don't recall that he had a beard.

Q. What is your best recollection about it, was the man clean-shaven or did he have a beard?

A. I believe he was clean-shaven, that is what I was trying to get at.

Q. The last time you saw Robert MARCHAND before today, was he clean-shaven, or did he have a beard?

A. I think he had a beard.

MISS JACOBSEN: Your Honor, may we inquire when that last time was?

THE COURT: Yes, you may.

A. I can't really put a date on it but some time ago. I really can't put a date on it.

BY MISS JACOBESEN:

Q. Do you know if you saw him in September of 1976?

A. I can't remember where I was then or if I did or not.

Q. Do you remember seeing him in August of 1976?

A. I don't know when the last time, you know, specifically when the last time was that I saw him.

MISS JACOBSEN: Thank you, Your Honor.

THE COURT: The Court will take a brief recess at this time.

(RECESSED FROM 11:32 A.M. UNTIL 11:50 A.M.)

WITHOUT THE JURY

THE COURT: Does the Government have anything further?

MISS JACOBSEN: Not at this time, Your Honor.

THE GOVERNMENT: Is the Government ready to proceed with the trial?

MISS JACOBSEN: Yes, Your Honor.

THE COURT: May I see Government's #11?

(Handed same to the Court)

THE COURT: We will bring in the Jury and proceed to opening statements. (11:54 A.M.)

MISS JACOBSEN: Your Honor, in terms of the

A. 300.

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pre-trial photographic identification, Your Honor ruled out in the Motion to Suppress previously, was that only admissible for voir dire purposes or does Your Honor intend to admit that at trial?

THE COURT: No, the Court finds that the, at this time, that there is adequate independent basis for the witness, VICTOR ROY, to base an in-court identification of the defendant, VICTOR ROY, or, the person referred to as BIG FOOT, BOB, without reference to the identification that was conducted by Special Agent HANDOGA that was previously suppressed.

MISS JACOBSEN: I don't think I have made myself clear. I am restricting myself to the just the photographic identification which Your Honor had previously ruled was impermissible, suggestive, not the in-court identification which Your Honor gave the Government leave to bring the record on, was that ruling to the pre-trial photographic identification which Your Honor excluded which has nothing to do with independent basis prior knowledge of acquaintanceship, does Your Honor's ruling in pre-trial still hold?

THE COURT: Yes.

MISS JACOBSEN: Thank you, Your Honor.

THE COURT: You may bring in the Jury.

IN THE PRESENCE OF THE JURY

THE COURT: The Court will say to the Jury that I regret the delay that has been visited upon us this morning but there are matters that had to be attended to and it was essential that they be disposed of prior to the commencement of the trial. The Government may proceed to make an opening statement if it cares to.

MISS JACOBSEN: Thank you, Your Honor. May it Please the Court, counsel, ladies and gentlemen. As you know from what you heard yesterday this case is about marijuana. You are going to hear evidence about several men, one of whom is on trial here. These men attempted to distribute 180 pounds of marijuana in the State of Vermont.

Now, my name as I told you yesterday, is Jill Jacobsen and I represent the people of the United States in the court room here. Seated with me at the counsel table is JOHN HUGHES, who is also an Assistant U.S. Attorney and directly behind him is Agent Theodore HANDOGA, the Drug Enforcement Administration.

Now, the defendant, ROBERT MARCHAND, is charged in one count of possession with intent to distribute and distribution of 180 pounds of marijuana. He is also charged in that same count, with aiding and abetting others in the possession with intent to distribute and distribution of marijuana.

As the Judge will tell you later, if you find him guilty of any one of those things, you must vote to convict.

Now, during the course of this trial, we will prove to you that on or about July 18th, 1975, the defendant had in his possession more than 180 pounds of marijuana and that he transferred it to two other people, RICHARD PERKINS and VICTOR ROY, knowing that those two people intended to sell it to someone else.

Now, the testimony given by Government witnesses will show that phone calls were placed from the telephone in PERKINS' house to a phone in the defendant's house. These calls were placed shortly before the time that PERKINS and ROY arranged to meet the defendant in Brattleboro, Vermont to obtain the marijuana. They did meet. They went to Howard Johnson's and they met in the parking lot, then they got in their cars and four men drove to a spot on a dirt road and on that spot on the dirt road, the marijuana was transferred from the defendant's car to the car that PERKINS and ROY were driving.

And, after it was placed in their car, they were told to come back with the marijuana or the money that they got from selling it. They parted company, PERKINS and ROY went up to SOUTH BURLINGTON, VERMONT and later on that same day, they attempted to distribute 180 pounds that they had gotten in Brattleboro.

What they didn't know, was that the person that they tried to give it to, or tried to sell it to, was under-cover Agents of the Drug Enforcement Administration. When they tried to sell the marijuana to him, they were arrested.

Now, RICHARD PERKINS and VICTOR ROY have already pled guilty and have been sentenced for their part in that transaction and their testimony here will prove that the defendant is also guilty, that he supplied them with the marijuana, that they tried to sell in BURLINGTON, VERMONT.

Now, in addition, you will receive other testimony. Live testimony from witnesses and through exhibits showing you that the contents of the packages that were taken from ROY and PERKINS in BURLINGTON were analyzed by a chemist and in fact, consist of marijuana.

You will also see records of the telephones in PERKINS' house and in the defendant's house. You will see the numbers of PERKINS, you will see the calls that they placed the time that they were trying to contact their supplier.

The defendant, ROBERT MARCHAND, will be identified as the "Bob" that PERKINS and ROY called and he will be identified as the "Bob" who supplied them with 180 pounds of marijuana.

Now, I am sure you all remember yesterday, there was some discussion when we were choosing a jury about some peoples feelings that the Government shouldn't prosecute marijuana cases, but we are confident that you, as jurors, will listen to all the evidence and judge it according to the law. And, we are sure when you consider all the evidence, you will find that we have proven the allegations in the indictment and we have proven the defendant is guilty beyond a reasonable doubt. Thank you.

MR. OTTERI: May we approach the Bench, please?

THE COURT: Yes.

AT THE BENCH, OUT OF HEARING BY THE JURY

MR. OTERI: First, Your Honor, the defendants would move for a directed verdict on the opening, based on the fact that the evidence does not, the evidence which we have already heard on voir dire and which was now stated by the U.S. Attorney, could not be stated, in fact, does not make out a prima facie case of distribution, there, that there is substantive evidence that Mr. MARCHAND was in fact BIG FOOT which should go to the Jury and for that reason, we have heard it under oath, we ask for a directed verdict, motion of judgment of acquittal.

THE COURT: Motion will be denied.

MR. WEINBERG: Secondly, we would ask for the Jury to be instructed to pleas of guilty by Mr. PERKINS and Mr. ROY in that evidence against Mr. MARCHAND. That was one of them.

THE COURT: We will instruct that later on when it is offered, if it is.

MR. OTERI: Thirdly we would move for a mis-trial based on the U.S. Attorney's statement to the Jury during the opening which we consider improper. Firstly, that there will be identification for ROBERT MARCHAND as BIG FOOT, which we have reason to believe is untrue given the voir dire. Secondly, the comments and statements that the marijuana law is not suitable and consistent with the purposes of an opening.

THE COURT: Your motion is denied on all grounds.

Does the defendant care to make an

opening statement?

MR. OTTERI: Is it the policy of this court, - it varies from state to state that the defendant has the right to reserve the right to make his opening statement after the conclusion of the Government's case?

THE COURT: We will allow you to do so, if that is your desire and also afford you to make an opening statement at this time.

MR. OTTERI: I have no statement to make at this time.

THE COURT: Very well. The Court will recess at this time, before proceeding with the evidence, until 1:30.

Now, the Court again wants to caution the Jury it sometimes occurs in criminal cases, that the Jury is kept sequestered, kept together, during the trial of that case, so they won't be subjected to any outside influences. There has been no request in this case that that be done and the Court will not order it, but, the reason that the Court doesn't order it, is that I have faith in and confidence that you will abide by the Court's instructions regarding not reading anything about this case or not listening to any discussions that may occur in your presence and not entertaining any communication from the news media about it or from any other source.

The Court notes that the case has been the subject of a newspaper article this morning and the Court specifically enjoins you from reading anything about the case either in the Rutland Herald or any other newspaper or through any other of the news media and for that reason, you will be allowed to separate during certain recesses of the Court until the case is submitted to you. But, I want to make it perfectly plain that the Court, it is imperative that you comply with the Court's instructions in this regard and in scrupulous detail and with scrupulous attention.

We will resume at 1:30.

(RECESSED FOR NOON LUNCH)

1:35 P.M. WITH THE JURY PRESENT

THE COURT: You may proceed, Miss Jacobsen.

MISS JACOBSEN: Thank you, Your Honor, the Government would call RICHARD PERKINS to the witness stand.

RICHARD WAYNE PERKINS having been recalled as a witness by the Government, was duly warned that he was still under oath and further testified on his oath as follows:

DIRECT EXAMINATION BY MISS JACOBSEN:

Q. Would you state your name for the record and now I am going to ask you to please be sure to speak loudly enough so that everyone in the jury box can hear you.

A. My name is Richard Wayne Perkins.

Q. Would you tell us what your address is now?

A. Margaret Street in Herkimer, New York.

Q. Where were you living in July of 1975?

A. Waittsfield, Vermont.

Q. Are you employed now?

A. Yes, I am

Q. What do you do?

A. I am a service manager in a garage.

Q. Are you the same Richard Perkins who was involved in a marijuana transaction on July 18th of 1975?

A. Yes, I am.

Q. And were you arrested on that day for attempting to distribute marijuana?

A. Yes, I was.

Q. And did you enter a plea of "guilty" to those charges?

A. Yes.

Q. Were you sentenced in Federal Court in Vermont?

A. Yes.

A. Yes.

Q. Would you tell us what your sentence was, please?

A. It was 3 years, probation.

Q. All right now Richard, I'd like you to recall that transaction on July 18, 1975, where did you go to get the marijuana?

A. Down to Brattleboro, Vermont.

Q. And from whom did you get it?

A. A man known as Big Foot and a friend of his.

Q. Do you know the friend's name?

A. I think it was Dan.

Q. All right, this man that you knew as Big Foot, do you know him by any other name?

A. I knew him as Bob.

Q. I'd like you to explain how that meeting was set up.

A. I received a phone call at the house and talked to Big Foot and he said that there was a, there was more than we could ever use and then Victor Roy and I drove down to Brattleboro, waited for a couple of hours and met Bob and his friend and then drove to another area and we had expected to pick up a small amount and ended up receiving a large amount. When we were leaving the Big Foot had said we should have the money or the "grass" back that evening and then we left and went back home to Waittsfield.

Q. All right now, let's go back for a minute to that phone conversation, you said you got a call at your house, was that?

A. In WAittsfield, Vermont.

Q. All right and when you were talking and you said Big Foot said there is more than you know what to do with, can you tell us what he was referring to at that time?

A. More marijuana.

Q. And was that the substance of your conversation with him?

A. Yes.

Q. All right, did you say anything at that time about how much you expected or how much you wanted to purchase from him?

A. If I remember correctly, I think I only wanted 4 pounds.

Q. And do you remember if you said that?

A. There was someone in Burlington that wanted a great deal.

Q . There was someone in Burlington who wanted a great deal and were you expecting to supply it to that person in Burlington?

A. Yes.

Q. All right, did you arrange during this telephone conversation where you were going to meet, specifically?

A. At Howard Johnson's in Brattleboro.

Q. All right and did you go to the Howard Johnson's in Brattleboro?

A. Yes, sir.

Q. Did you go alone?

A. No, I went with Victor Roy.

Q. How did you get there?

A. Drove my car.

Q. Do you recall what time of day it was when you went there?

A. We left in the morning around 10:00 or 11:00, something like that.

Q. All right now, when you got to the Howard Johnson's in Brattleboro, what did you do there? Did you meet the people right away that you arranged to meet?

A. Waited for two hours.

Q. And did you do anything while you were waiting?

A. Oh, had a couple of beers, walked around, ate lunch.

Q. Do you recall placing any calls to anyone?

A. Placing calls, no.

Q. All right now, once, - where were you when you did meet these two men?

A. In the bar.

Q. Inside the Howard Johnson's?

A. Yes.

Q. And what did you do when you met them inside the bar? Was there any conversation?

A. A brief "hello".

Q. Anything further?

A. No, then we left.

Q. All right, where did you go when you left?

A. Out, got in our cars and followed the -

Q. What kind of a car did they have?

A. A Thunderbird.

Q. Do you remember the color?

A. No.

Q. All right, when you followed them in your car, do you know where you went?

A. Down the road about a mile or so.

Q. And what happened at that point?

A. Then we stopped and a discussion went back and forth of whether or not we should, I think more or less it was to get a large amount of grass without any money and then all the stuff in my, - opened up my trunk and took a spare tire and all kinds of things out and a lot of marijuana was placed in by Big Foot and his friend.

Q. Were you inside your car or out of the car at that point?

A. I was outside.

Q. Were all four of you, the two men that you met and you and Victor Roy, all outside the cars?

A. Yes.

Q. And were you all participating in these discussions about what you were going to do with the marijuana?

A. Mostly discussion was between Big Foot and his friend.

Q. Did you and Victor participate in the discussions at all or either one of you?

A. Victor Roy may have been talking with them, but I think mostly it was, they had the most to lose, so I think it was just a rapid discussion between them.

Q. And did you hear their conversation?

A. No.

Q. Okay now, after the conversation, what took place?

A. The transfer of marijuana from their trunk to the trunk of my car.

Q. And who put the marijuana in the trunk of your car?

A. Big Foot and I think Victor and I got it in the trunk as fast as we could and got out of there.

Q. Were you working quickly to get it into the trunk of your car?

A. I remember I had a lot of things in my trunk and just being thrown out and the marijuana was being shut in as fast as possible.

Q. And what was your state of mind at the time, do you remember?

A. Oh, I'd say very nervous.

Q. Okay, do you recall how much marijuana was put into the trunk of your car?

A. About 180 pounds.

Q. Can you describe what it looked like? What was it, in small packages, large packages, or, -

A. Four, fairly large packages.

Q. And you estimate about what size those packages were?

A. About 2 feet by 2 feet, square.

Q. Were all the packages of marijuana received, the same size?

A. They were close, within five pounds of each other.

Q. I'd like to show you Government's Exhibit #2 for identification and ask you if you can identify that please?

A. That is it.

Q. That is what?

A. That is the packages of marijuana.

Q. Those are the packages of marijuana that were placed in your car?

A. Yes.

Q. All right, I'd like you to look at Government's Exhibit #3 for identification, can you identify those?

A. Same thing.

Q. Would you describe what is in the packages?

A. Four pictures? Four good-sized bales of marijuana.

Q. And is that the marijuana that was placed in your car?

A. Yes, it is.

Q. All right, I'd like to show you Government's Exhibit #4 for identification, would you identify that picture?

A. It is one of the bales.

Q. And can you tell us what is standing next to the bale there?

A. It is a ruler, A roller.

Q. Is that one of the bales that was placed in your car?

A. Yes.

Q. I show you Government's Exhibit #5 for identification and would you identify that please?

A. It is another one of the bales with a ruler in front of it.

Q. Is that another bale that was put in your car?

A. Yes, it is.

Q. One last picture. I'd like to show you Government's Exhibit #6 for identification and ask you if you would identify that?

A. All four of the bales stacked neatly on top of each other.

Q. All right.

MISS JACOBSEN: Your Honor, at this time I would like to introduce these into evidence.

MR. WEINBERG: No objections, Your Honor.

THE COURT: The offer is received including Government's #2, 3, 4, 5 and 6.

MISS JACOBSEN: Your Honor, I'd like to pass these to the jury if I may.

THE COURT: You may.

(Photographs were passed to the jurors for their inspection).

Q. Now RichaRD, were those bales put in the trunk of your car labeled or marked in any way?

A. Each one had a weight.

Q. And how was that weight put on the bales?

A. If I remember correctly, it was duct taped with a pen and a -

Q. I'd like to show you Government's Exhibit #15 for identification and ask you if you can identify that?

A. Well that's what it was, that kind of stuff.

Q. What was it? Can you descfibe it for us?

A. This thing, duct tape with pen on it.

Q. Yah.

A. Yes, that's it.

Q. All right and is there some writing on the tape?

A. One, 14 and 49.

Q. And did that writing have any meaning for you?

A. Usually it was like a gramway on the bale that told you approximately what it had been weighed out on is a very large scale.

Q. All right and was each of the bales marked in that way?

A. Yes.

Q. All right, I would show you Government's Exhibit #16 for identification and can you identify that?

A. Yes. That was 47 and a quarter, it would be 47 pounds and maybe 47 and a quarter pounds, probably.

Q. Was that tape on one of the bales that was put into your car?

A. Very well could be. I, yes, I think it was.

Q All right, I show you Government's Exhibit #17 for identification, can you identify that?

A. That is another tape of some numbers on it. (Mumbling)

Q. All right, be sure and keep your voice up when you are talking. Government's Exhibit #18 for identification, can you identify that?

A. Yes, it is a, there are two bales that was saying exactly how much each one weighed.

Q. All right now, Your Honor, I'd like to offer these as exhibits.

MR. WEINBERG: No objections, Your Honor.

THE COURT: Government's #15, 16, 17 and 18 are received.

Q. Richard, when these bales of marijuana were being put into your car, was there any discussion about price?

A. I think it was to be at $300.00 a pound.

Q. All right, was there any discussion of one over-all price that you would pay for all this together, or was it limited to the $300.00 a pound?

A. Well, I think it was, the only way you could really set any kind of a price would be the way it right up, to be found exactly, because you never know, one might have been off and it wasn't any real, - just $300.00 a pound.

Q. All right and how much was put into your car?

A. Four bales, approximately 180 pounds.

Q. All right now, after the bales were put into your car, what happened then?

A. Victor Roy and I drove home.

Q. All right.

A. To Waittsfield.

Q. Where you left to drive home, was there any conversation?

A. Just that as we were leaving, Big Foot said that we should have the money or the grass back that evening.

Q. And did you make any further arrangements to meet that evening?

A. No, we took right off.

Q. Okay and when you left then, where did you go?

A. Back to Waittsfield, Vermont.

Q. What did you do when you got back there?

A. Called, got in touch with a man in Burlington.

Q. And what were you getting in touch with this man for?

A. Tell, to sell him the marijuana.

Q. Did you talk to him about how much you would sell it for?

A. About sixty or sixty-one thousand dollars.

Q. And what did you do after you had that conversation?

A. Agreed to meet at the Holiday Inn in Burlington and went down there and met him and he had some friend with him and we met them and agreed to transact, you know, the different bales and all that and just got arrested.

Q. During the time that you were arranging this sale, you were arrested?

A. Yes.

Q. And do you remember who it was that arrested you?

A. It was Officer HANDOGA and George BERTRUM and about 20 or 30 other police officers.

Q. Now, Richard, shortly after the time that you were arrested, were you interviewed by Agent HANDOGA?

A. Yes, I was.

Q. And during that interview, did you give Agent HANDOGA a description of "Big Foot" or "Bob", the person who had given you the marijuana?

A. Yes, I did.

Q. Do you recall that description now?

A. Yes, it was a six-foot, one, 220 pound man with blond hair.

Q. And big features?

A. Yes, big features, the guy is big, has a big nose, bir hands, broad shoulders.

Q. Did you say anything about his age?

A. Oh, that he was between 25 and 30.

Q. All right, do you recall if you said anything else specifically about his features?

A. No.

Q. All right and after that interview that was shortly after your arrest, did you have another occasion to speak with Agent HANDOGA about a month later?

A. Yes, I did.

Q. And about that time did you draw a sketch or a picture of Bob, Big Foot, the person who supplied you?

A. About that time, yes, I did.

Q. All right. When you drew the sketch, were you trying to draw a picture of the person who gave you the marijuana?

A. Yes.

Q. All right, I'd like to show you Government's Exhibit #7 for identification and ask you if you can identify that picture?

A. Yes, that is the sketch that I drew.

Q. And who is that a drawing of?

A. Of Big Foot.

MISS JACOBSEN: I'd like to offer this into evidence, Your Honor.

MR. WEINBERG: Objection and we would ask to approach the Bench for purposes of stating the reasons.

THE COURT: Very well.

(At the Bench, out of hearing by the Jury)

MR. WEINBERG: The reasons for the objection are two, Your Honor. The first is that during the pre-trial hearing on pages 68 and 69 of the transcript he stated that at the time of his drawing the sketch, "I didn't really know what to draw. It was just, I remember he was just a big, blond-haired guy and he just had big features and I just drew a big, blond-haired, you know, male features." Question: "You don't have a very good memory of this man, do you?" Answer: "No, sir, I don't think so, no." Question: "And you didn't have a terribly good memory of him at the time you made the sketch either, did you?" Answer: "No, it took me a long time to draw it, I remember." So, I feel there is not enough foundation of - fact foundation, of reliability. Second of all, I think that all other mention of pre-trial identification would be inconsistent with Rule 801 D-1-C of the Federal Rules of Evidence which states that a statement is not hearsay and is admissible if it is one of the identification of the person made after perceiving him. Both photographic identifications and sketch would violate that rule. There are two ways. One is, he stated yesterday and I expect him to say today that he never perceived MARCHAND and second of all, there was no identification in that both his photographic identification and the sketch were not reliable basis. It was not an identification. There was no certainty. It was unreliable. There was no memory. In fact, in the photograph he said it wasn't a definite I.D. So for those two reasons it violates the rule and there is no factual foundation. Both the sketch and the photograph ought to be excluded.

THE COURT: The Court will receive it.

MR. WEINBERG: Rather than come up here when the photograph is going to be offered, can I have the same objections?

THE COURT: We will allow you to make an objection at that time.

MR. WEINBERG: Okay, Your Honor.

(Conference at the Bench concluded)

MISS JACOBSEN: Your Honor, may I pass this to the Jury?

THE COURT: You may.

EXAMINATION RESUMED BY MISS JACOBSEN:

Q. Now Richard, wheh you were drawing the picture, were you trying to draw the picture of the man that you had seen as you saw him?

A. Yes.

Q. Now, how was your memory right now about July 18, 1975?

A. I would have to say very vague.

Q. All right, I'd like you to look carefully in the court room and see if you see anyone who resembles Bob?

A. Two or three people.

Q. All right, would you tell us who those people are, please?

A. There, the gentleman in the grey suit, the gentleman in the blue suit and -

Q. Excuse me, I think you will have to be more specific and either point them out or describe something else other than just a grey or a blue suit.

A. That gentleman right there and the gentleman standing up.

THE COURT: Well, who do you mean by "that gentleman there?"

A. That gentleman right there.

MR. WEINBERG: May we have the name for the record?

MR. DAVIDO: Michael Davido.

Q. And can we have everyone's name, please?

MR. MARCHAND: Robert MARCHAND.

MR. WHITE: Richard WHITE.

Q. All right now Richard, do you feel that you would like to stand closer to any of these people to be sure that you have a good look at them?

A. I am sure, you know, -

Q. YOu feel that each of those people resembles Bob, Big Foot, in some way?

A. Right [illegible]

Q. Can you tell us in some what what are the features that you are thinking of that make you feel these people resemble or remind you of Big Foot as you remember?

A. The size of Mr. Divido and the shape of his face and just if he had broader shoulders probably and sort of the color of Mr. Marchand's hair. It is lighter and then the way that the other guy's hair is that way.

Q. Do you mean the style or the color?

A. The style, if it was a lot shorter.

Q. All right now, do any of these gentlemen look to you now, the way Bob looked on July 18th, 1975?

A. Not at all.

Q. All right, what are the differences? How did Bob look to you on July 18, 1975?

A. Very large. Very healthy. Very short hair, like a football player would look after he had been working out, I'd say.

Q. How was he dressed when you saw him?

A. Short or casual pants and T shirt and things like that.

Q. And this was in July, is that correct?

A. Right.

Q. Was he tanned?

A. I'd say so.

Q. All right, do you recall if the last time you saw Bob on that day, did he have a beard?

A. To the best of my recollection, he didn't.

Q. Do you recall if when you saw Bob on that day he was wearing glasses?

A. I could only guess. I could only guess. I really don't know.

Q. All right Richard, now, did you have occasion to, last year some time, to look at a series of photographs?

A. Yes.

Q And were these pictures shown to you by Agent HANDOGA OF the Drug Enforcement Administration?

A. Yes, they were.

Q. And did he ask you what, what did he ask you when he showed you the photographs?

MR. WEINBERG: Objection, hearsay.

THE COURT: Objection over-ruled.

A. Just, - I really don't remember what he said.

Q. What was the purpose of your looking at the picture, do you remember that?

MR. WEINBERG: Objection, Your Honor.

THE COURT: Objection over-ruled.

A. To find two people that I had seen on July 1975.

Q. And when you looked over those pictures, did you select one picture that closely resembled Bob or Big Foot?

MR. WEINBERG: Objection, leading and hearsay.

THE COURT: Sustain the objection to the pending question.

Q. Did you select a photograph from that series?

A. I selected I think, 2 or 3.

Q. All right and who were those people supposed to be?

MR. WEINBERG: Objection, hearsay.

THE COURT: Yes, we will sustain the objection to the pending question.

MISS JACOBSEN: May I have this marked, please?

MR. WEINBERG: may we approach the Bench please, Your Honor?

THE COURT: You may.

(At the Bench, out of hearing by the Jury)

MR. WEINBERG: We would object to the showing the pictures to this witness or any further testimony regarding prior photographic identification on the grounds that it is hearsay and on the grounds that it does not conform to the hearsay exception to the Federal Rules of Evidence, and on the grounds that the photographic identification previously made was not positive and therefore, it is more prejudical than - and irrelevant primarily on the hearsay ground.

THE COURT: Objection over-ruled.

MR. WEINBERG: Will you please note my objection?

THE COURT: Certainly.

(Conference at the Bench concluded)

Q. Richard, I'd like to show you Government's Exhibit #19 for identification and can you identify that?

A. That is a picture that I picked.

Q. I'd like to offer this in evidence, Your Honor.

MR. WEINBERG: Same objection, Your Honor.

THE COURT: We will note your objection and over rule it.

MR. WEINBERG: May I have a limiting instruction?

THE COURT: Pardon?

MR. WEINBERG: May I have a limiting instruction regarding the use to which this picture can be made by the Jury?

THE COURT: In what respect?

MR. WEINBERG: Well in the respect that it is, if it all, it is inconsistent with the in-court procedure and should not be used to substantive evidence.

THE COURT: We will allow you to cross-examine regarding it. We will allow you to do so now if you care to.

MR. WEINBERG: I will cross-examine him when the direct-examination is finished.

THE COURT: Very well.

MR. WEINBERG: Please note my objections?

THE COURT: We will note your objections.

Q. Richard, after you selected this picture, did you put your initials on it?

A. Yes.

Q. Did you put the date on it?

A. I don't remember.

Q. Take a look. (Handed document to the witness)

A. Yes, I did.

Q. And what was the date?

A. 4-26-76.

Q. Thank you and how long was that after you had seen Bob the last time?

A. It was about a year, I don't -

Q. About a -

A. About a year, less than a year.

Q. When did you see him last?

A. In July of 1975.

Q. And this was April of 1976?

A. 8 or 9 months.

Q. All right now, was July 18th, 1975 the first time you ever saw Bob?

A. When?

Q. July 18, 1975?

A. I saw him in May.

Q. Was May the first time you ever met him?

A. Yes, it was.

Q. All right, would you tell us how you met him?

MR. WEINBERG: Objection.

THE COURT: Objection over-ruled.

MR. WEINBERG: Objection is based on Rule 404 B Your Honor.

THE COURT: the Court will allow the question. Go ahead.

Q Richard will you tell us how you happened to meet Bob?

A. Let's see, I had met Victor Roy and we were discussing buying and selling of marijuana and Victor said he might know of somebody that could sell, just he MIGHT Know of someone who could help us out and made a phone call and arranged to meet someone and we drove down to, I'm not sure where and met this guy Big Foot and talked for about five, 10 or 15 minutes about nothing and then Victor and I left and Big Foot left and Victor told me that he might give us a call and he might not and that was the end of the first -

Q. And at that tine were you and Victor Roy living in the same house?

A. No, we weren't.

Q. Were you living in the same house in July of 1975?

A. Yes.

Q. All right now, subsequent to that first meeting with Bob, when did you have any contact with him again?

A. I think it was a week or two later.

Q. Would you tell us when that was, please?

A. Received a call and that there was some grass available and I rounded up a friend in Burlington and we drove down to Howard Johnson's and Victor took the money and went and came back in about two hours with about 20 pounds of marijuana.

Q. All right and did you have any further contact after that day?

A. I did one more deal somewhat similar to that one.

Q. And when did that happen?

A. Maybe have been a week later, a week later or so.

Q. All right, would you tell us what happened on that occasion?

MR. WEINBERG: Objection. Same objection.

THE COURT: Objection is over-ruled.

A. Well, we drove down with one person from Burlington and Victor went off with Big Foot and came back. Did something of that nature and that didn't take too long. About an hour or so.

Q. And did youu see Big Foot on that occasion?

A. Not so I could recognize him. In a car criving in and driving out.

Q. What kind of a car was he driving that day?

A. Thunderbird.

Q. All right and on that occasion, did you have any conversation with him?

A. No.

Q. Were you close enough to talk to him at any time?

A. No.

Q. have you ever had occasion to call Big Foot on the telephone or try to reach him by phone?

A. You are -

(LAST QUESTION READ ALOUD BY THE REPORTER)

A. I'm not sure.

Q. Are you or were you in July of 1975, aware of a phone number that you could use to reach him?

A. I was aware there was a phone that you could reach him by, yes.

Q. All right and did you know that phone number at that time?

A. Yes.

Q. And do you have any present memory what that phone number is?

A. No, really.

Q. All right, is there anything that would refresh your recollection?

A. Yah, maybe if I saw the phone number I'd recognize it.

Q. All right, I'll ask you to look at this and see if it refreshed your recollection. Please don't read from it out loud, just, -

A. Oh, - (Looking)

THE COURT: By "this" what are you referring to, Miss Jacobsen?

MISS JACOBSEN: Phone numbers that -

THE COURT: I mean the identification number.

MISS JACOBSEN: It is Government's Exhibit #8 for identification.

Q. Does that refresh your recollection, Richard?

A. There's, this could be it.

Q. Which number are you referring to?

A. 622-8206.

Q. And do you remember where you first heard that number?

A. No, I don't really.

Q. Do you know where you -

A. Victor might have told it to me at one point or another.

Q. Did you - do you remember if you ever called that number yourself?

A. No, I don't.

MISS JACOBSEN: Can I have a minute, Your Honor?

THE COURT:

MISS JACOBSEN: I have no further questions of Mr. Perkins.

CROSS EXAMINATION BY MR. WEINBERG:

Q. Stand up, Mr. Marchand, please?

(Mr. Marchand stood up)

Q. Is that man standing, Big Foot?

A. As best as I can recollect, no.

Q. Sit down, Mr. Marchand. Is it fair to say if Big Foot were standing there, you think you could be able to identify him, don't you?

A. It's a good possibility, yes.

Q. Okay, directing your attention, Mr. Perkins, back to July of 1975, that is the month in which you were arrested, is that correct?

A. Yes, it is.

Q. Starting after you were arrested, you were pretty frightened, weren't you?

A. Yes.

Q. Pretty frightened to go into jail as a result of the arrest?

A. Yes, I was.

Q. You found out that you had been or that you would be tried for marijuana dealing with the Government informer Mr. Guilbo, is that correct?

A. Yes.

Q. And when you went up to Burlington to try to sell Mr. Guilbo the marijuana all the police officers and D.E.A. agents were there ready to arrest you, is that correct?

A. That's right.

Q. You were set up, is that right?

A. Yes.

Q. And you immediatley started to, as a result of your fear, cooperating with the United States Government isn't that right?

A. About a week later.

Q. Right. You and your attorney had numerous meetings with Mr. HANDOGA, a Special AGent of the Drug Enforcement Administration, did you not?

A. Yes.

Q. You were attempting to be cooperative at all times, were you not?

A. Yes.

Q. And today, still, you are attempting to be cooperative and tell the truth and answer the questions to the best of your recollection, aren't you?

A. Yes.

Q. Okay. Now, directing your attention to the sketch which has been marked Government's Exhibit #7, this is a sketch which you were requested to make by Agent HANDOGA, were you not?

A. Yes.

Q. Now at the time you made it, you didn't have a very clear vision in your mind of what this Big Foot looked like, did you?

A. I never really did, except now when he was standing in front of me and it was always a fairly nervous type of arrangement.

Q. Do you recall saying at a prior hearing, Mr. Perkins, in response to the question and is this picture, -

MISS JACOBSEN: Can we have a page number?

MR. WEINBERG: Page 66.

Q. "And is this picture," referring to the sketch, "a fair representation, or do you feel or did you feel at the time you drew it that that was a fair representation of this person known as Big Foot?" And do you recall answering, "Well, not really, because I didn't really, well, when I was drawing it, I didn't really feel that it was anything." Do you recall that testimony here a couple of months ago?

A. Yes.

Q. And that testimony was truthful, wasn't it?

A. Yes.

Q. Okay, do you recall the following questions and answers regarding the sketch. Question: "Would you say the sketch is a perfect, fair, or poor representation of the person you remember as having been the source of the marijuana?" Pages 68 and 69. Answer: "I "honestly don't know. I really don't." Question: "Is it fair to say that you don't have a good memory?" Answer: "In my mind, I, when I was sketching it I just sat there for the longest time and didn't really know what to draw and that was just a - I just remember he was a great big, blond-haired guy and he just had big features. And I just drew a big, blond-haired, you know, male features." Question: "You don't have a very good memory of this man, do you?" Answer: "No, I don't think so, no." Question: "And you didn't have a terribly good memory of him at the time you made the sketch either, did you?" Answer: "No, it took me a long time to draw it, I remember." Do you remember those questions and answers?

A. Yes.

Q. And those were truthful statements, were they not?

A. Yes, they are.

Q. Okay. By the way, sir, when you saw this Big Foot fellow in the T - Bird, do you recall that the Thunderbird car that you saw on two occasions, had a New York registration number, - New York license plate?

A. It would be complete, yes. I remember it as being white or I really don't remember.

Q. Okay now, this Big Foot fellow was a huge fellow, was he not?

A. Yes.

Q. He was much bigger, - Mr. Marchand, stand up. He was much bigger in size than Mr. Marchand, was he not?

A. Seeing someone in shorts and a T shirt and it was always moving fast and who had obviously, large shoulders and muscles, I just assumed he was as large as Mr. Davido, or larger.

Q. Mr. Marchand, Mr. Davido, will you stand together, please?

A. (Messrs. Marchand and Davido stood up, side by side).

Q. Is your recollection that Big Foot had the physical stature of Mr. Davido, rather than Mr. Marchand, to the best of your recollection today?

A. I just - I thought he was larger.

Q. Okay, larger than either of them?

A. Yes.

Q. Thank you. You may both sit down. (Messrs. Davido and Marchand sat down).

Now, you didn't know that man, Mr. Marchand, in July of 1975, did you?

A. No, I did not.

Q. YOu don't know whether or not Bob Marchand had a beard in 1975, do you?

A. I don't know anything about it.

Q. Okay, They are referring to the time in which Agent HANDOGA asked you to identify photographs, I'd like the photographs marked for identification, Your Honor.

THE COURT: You may.

THE CLERK: Should they be marked separately?

THE COURT: They should be marked separately.

THE CLERK: Each one?

THE COURT: Yes.

Q. May I proceed with the questioning while the photos are being marked, to save time?

THE COURT: You may.

Q. You were asked if you recalled the number that either you or Mr. ROY had to reach Big Foot, do you remember those questions from the United States Attorney?

A. Yes, I do.

Q. And you looked at Government's Exhibit #8 for identification, the list of phone numbers.

A. Yes.

Q. Now, you never phoned Big Foot yourself, did you?

A. No.

Q. In fact, on July -

A. The best as I can recollect, no.

Q. Okay, well, do you have a crystal-clear memory of what Big Foot's phone number was?

A. No.

Q. Aren't you just guessing when you picked out a number and said"this could be the number"?

A. More or less, yes.

Q. It could be lots of other numbers too, couldn't it?

A. I don't, - none of us were in a set place, sir. Like VICTOR and I stayed at the house in Waittsfield 3, 4 or five days a month. We were always all over the place.

Q. It's fair to say that the number you said could be 622-8206, is not a number you can state with certainty was the number you used or Mr. ROY used if someone had to reach Big Foot, isn't that fair to say?

A. Yes.

Q. Just a number you guessed at as opposed to other numbers that were on this sheet, is that right?

A. Yes.

Q. Okay.

THE COURT: How are the photographs marked, Mr. LaVICTOIRE?

THE CLERK: Your Honor, they are Defendant's "C", through "O" for identification.

THE COURT: Very well, you may proceed, Mr. Weinberg.

Q. Thank you, Your Honor. I show you Defendant's Exhibits "C" through "O" and Government's Exhibits #12 and #13, all for identification and ask you whether or not these are the pictures that you were shown by Agent HANDOGA?

A. I'd say these are the ones I used to be,...

Q. Okay, you were asked to select the photos which most resembled the man you saw in July 18, 1975, were you not?

A. Yes.

Q. And you looked through these photos did you not?

A. Yes.

Q. And isn't it -

A. There was more than that.

Q. There's more photos than this?

A. Yes.

Q. And when you went through them you were looking for those pictures that were closest to the two men you had recalled back in July of 1975, is that right?

A. Yes.

Q. This was in April of 1976?

A. Yes.

Q. About nine months after the July 1975 meeting, is that right?

A. Yes.

Q. And that July 1975 was the last time you had seen Big Foot, is that correct?

A. Yes.

Q. In fact, even today, July 1975 is the last time you saw Big Foot?

A. Yes, it is.

Q . And during this nine months you were never asked to look at photographs, were you?

A. No.

Q. During this nine months you were never asked to look at various people in a line-up to see whether you could select out Big Foot, were you?

A. No.

Q. Okay and isn't it fair to say the most you did, was select out two or three pictures that resembled the two men you saw in July of 1975?

A. Yes.

Q. You didn't make any positive identifications of the photographs, did you?

A. I really don't, especially the one I had only seen for about three minutes.

Q . Okay and same with Big Foot, it wasn't a positive identification, was it?

A. No.

Q. So, when you selected Government's Exhibit #19 for identification, that photograph, you were just saying this man looked something like Big Foot, is that right?

A. Yes.

Q. You weren't saying this was Big Foot, were you?

A. No.

Q. Okay, isn't it fair to say the only reason you selected this picture and one other, rather than the other pictures, is those two pictures were the only ones that looked anything like the men you saw in July 1975, is that correct?

A. Yes.

MR. WEINBERG: I have no other questions.

REDIRECT EXAMINATION BY MISS JACOBSEN:

Q. Richard, is it true that you spoke with Agent HANDOGA about a week after your arrest, isn't that right?

A. Yes, it is.

Q. And it is true that you have agreed to cooperate with the
Government, isn't that correct?

A. Yes.

Q. And in that agreement to cooperate, are telling the
truth in your testimony?

A. Yes.

Q. And has the Government ever asked you to lie in your
testimony here?

A. No.

Q. And do you have any fear about what the Government would
try to do to you if you don't cooperat[illegible]

A. None, whatsoever.

Q. So are you cooperating out of fear then?

A. No.

Q. Now that sketch that you made, Richard, you made this
about a month after you saw Big Foot, right?

A. Yes.

Q. And you did testify at the hearing in October, on page
66 of the transcript after you said you weren't sure
it was a fair representation you were asked the question, "Were you trying, when you made that drawing,
to represent this person as well as you could?" And
the answer you gave was, "Right." Is that correct?

A. Yes.

Q. Do you remember being asked that question and giving that
answer?

A. Yes, I do.

Q. And is that still true, Richard?

A. Yes, it is.

Q. Now, it has been over a year since you last saw Big Foot, is that right?

A. Yes.

Q. And would you say your memory is as good now as it was a week after you saw him?

A. No.

Q. Would you say your memory for license plates now, is as good as a week after you saw Big Foot's car?

A. No, not at all.

Q. Do you recall when you stated that you thought the license plate was a New York license plate?

A. I, right now, I thought it was a New Jersey license plate.

Q. Do you recall ever talking to Agent HANDOGA and stating to him it was a New York license plate?

A. I thought it was a New Jersey license plate.

Q. Do you recall talking to Agent HANDOGA about that?

A. No, I don't. I remember talking about a license plate.

Q. And when was that, to the best of your recollection?

A. When was -

Q. When did you talk to Agent HANDOGA?

A. A week after I was arrested.

Q. A week after you were arrested?

A. (Nodded).

Q. Is that what you said?

A. Oh, yes.

Q. I didn't hear you.

A. A week after I was arrested.

Q. Did you know Big Foot's last name in July of 1975?

A. No.

Q. Did you have a last name for Bob, in July of 1975?

A. No.

Q. So that- if that person were Robert MARCHAND at that time, you didn't know it, is that right?

MR. WEINBERG: Objection, Your Honor.

THE COURT: We will allow the question.

A. If I, - please repeat it.

Q. If Big Foot were Robert MARCHAND, in July of 1975, you wouldn't know that, is that right?

A. Yah, that's correct.

Q. Did Big Foot have a beard when you saw him in July of 1975?

A. To the best of my recollection, he didn't.

Q. All right now, do you remember I showed you this Government's Exhibit #8, the telephone numbers on it?

A. Yes.

Q. All right now, Richard did you know that number in July of 1975?

A. I was aware of a number that he could be reached at.

Q. And had you seen that number written down somewhere?

A. Either written down or I, I really don't remember.

Q. But you did know that there was a number, is that right?

A. Yes.

Q. And did you have access to that number?

A. I think, like the last, about the last days before I got arrested, I think I did.

Q. All right, so that do you recall that number today?

A. Not positively.

Q. But you did know that number in July of 1975?

A. Yes.

Q. Now, when you were looking at the photographs and Agent HANDOGA asked you to select the pictures that most closely resembled Bob, or Big Foot, is that right?

A. Yes.

Q. And is that what you did when you selected Government's Exhibit #19?

A. Yes.

MISS JACOBSEN: No further questions, Your Honor.

MR. WEINBERG: I just have a few, Your Honor.

RECROSS EXAMINATION BY MR. WEINBERG:

Q. Although you were trying to make the sketch accurate, isn't it fair to say that after you concluded your efforts, you weren't satisfied it was a fair and accurate picture of Big Foot?

A. Yes.

Q. Okay, just one last question. Miss Jacobsen asked you that whether or not you knew Big Foot's last name in

July of 1975 and you said you did not, is that right?

A. Right.

Q. So, you didn't know whether his last name was - strike that. So you didn't know what his last name was back in July of 1975, you didn't know his lame as MARCHAND, is that correct?

A. Right.

Q. Mr. MARCHAND, stand up.

(Mr. Marchand stood up)

Q. Now, that is Robert MARCHAND, do you know Big Foot is not Robert Marchand?

A. To the best of my recollection, yes.

Q. Thank you, sir.

MR. WEINBERG: No other questions. I would just, Your Honor, offer the pictures which have been marked Defendant's Exhibits for identification, "C" through "O" I believe, and Government's Exhibits for identification, #12 and #13.

MISS JACOBSEN: The Government has no objection.

THE COURT: The Defendant's "C" through "O" are received and Government's #12 and #13 are received.

MR. WEINBERG: I omitted asking one question, may I have permission to ask it?

THE COURT: Yes.

MR. WEINBERG: Thank you, Your Honor.

Q. I show you what is now Defendant's Exhibit "C" sir and ask you whether or not you can identify it?

A. Yes, I can.

Q. What is it?

A. It was a photograph I picked to be the other person that had been with Big Foot.

Q. The person who most resembled the person who had been with Big Foot in July of 1975?

A. Correct.

MR. WEINBERG: No other questions. Rather than throw all the pictures to the Jury now, we could just do it at the end.

THE COURT: Yes.

MR. WEINBERG: Okay.

REDIRECT EXAMINATION BY MISS JACOBSEN:

Q. Richard, have you drawn other sketches of other people?

A. Yah, quite a few.

Q. Do you feel it is easy to draw accurate representations of other people?

A. If they are sitting in front of me.

Q. And did you have anyone sitting in front of you when you drew this picture?

A. No.

Q. Were you trying to draw that picture to the best of your ability and recollection, then, at that time?

A. I do remember just sitting there with a blank and I just like I just drew it.

Q. Were you trying to draw it -

A. Oh, yes.

Q. - to the best of your ability?

A. Yes.

Q. Thank you.

MISS JACOBSEN: Thank you, no other questions. Thank you, Mr. Perkins.

(Witness was excused and withdrew)

THE COURT: We will take a recess at this time.

(RECESSED FROM 2:45 P.M. UNTIL 3:07 P.M.)

MISS JACOBSEN: At this time, Your Honor, I would like to offer into evidence a stipulation that has been signed by all counsel and by the defendant, Mr. Marchand. We could have it marked for identification and if you would like, we could have someone read it into the record. I could read it, or, -

THE COURT: Well, let me see it.

(Document handed to the Court)

It appears that the stipulation has been signed by counsel for the defendant and the defendant himself as well as a representative of the Government, Jill Jacobsen as Assistant United States Attorney. The Court will permit the stipulation to be marked as Government's Exhibit and read to the Jury and the Court will instruct the Jury that the facts stated in the stipulation may be considered by you as evidence in this case for both sides have agreed that the facts as set forth in the stipulation may be considered by the Jury, rather than have witnesses called to present the evidence of the facts stated in the stipulation.

40* PERKINS - completed
Stipulation

MISS JACOBSEN: May I read the stipulation at this time?

THE COURT: You may.

MISS JACOBSEN: This stipulation which has been signed by myself as representative of the Government, by Robert Marchand, the defendant, by Martin Weinberg, Attorney for the defendant by, and by Richard White, attorney for the defendant, reads as follows:

"It is hereby stipulated and agreed by and between counsel for the above-captioned defendant and the United States, by and through George W. F. COOK, United States Attorney for the District of Vermont, that if called as a witness at trial, GLADSTONE GRIFFITH, a chemist of the Drug Enforcement Administration at the Northeast Regional Laboratory, New York, New York, would testify that on or about July 31, 1975, he removed Government's Exhibit #10 in a sealed condition from the vault of the Northeast Regional Laboratory; that he opened Government's Exhibit #10 and removed the contents comprising five zero three point seven four grams gross weight and four seven two point two three grams net weight; that he conducted a laboratory analysis thereon and found the substance to consist of marijuana, Cannabis sativa L.; that he then returned Government's Exhibit #10 which he personally weighed, sealed and signed to the Northeast Regional Laboratory, Drug Enforcement Administration vault.

"He would further testify that on or about July 31, "1975, he removed Government's Exhibits #14A - 14H in a sealed condition from the vault of the Northeast Regional Laborator; that he opened Government Exhibits and removed the contents comprising eight six point zero eight grams gross weight and five two point five three grams net weight; that he conducted a laboratory analysis thereon and found the substance to consist of marijuana, Cannabis sativa L., ; that he then returned Government Exhibits 14A - 14H, which he personally weighed, sealed and signed, to the Northeast Regional Laboratory, Drug Enforcement Administration vault.

"It is further stipulated and agreed to by and between counsel for the above-captioned defendant and the United States, that if called as a witness at trial, Special Agent GEORGE BURTTRAM, Drug Enforcement Administration, would testify to the following:

"1. that on or about July 18, 1975, he was acting in an under-cover capacity for the Drug Enforcement Administration;

"2. That on or about July 18, 1975, in South Burlington, Vermont, he seized from RICHARD PERKINS and VICTOR ROY a quantity in excess of one hundred eighty pounds of marijuana;

"3. That he placed the seized marijuana in the Burlington, Vermont, evidence locker, Drug Enforcement Administration, for safe-keeping;

"4. That on July 21, 1975, he seized marijuana exhibits were removed from the evidence locker and photographed "by Agent BURTTRAM;

"5. that on July 21, 1975, four large squares of the seized marijuana contained in plastic bags were transported by Agent BURTTRAM, along with United States Marshal HANSEN, to the ESSEX BEEF COMPANY in ESSEX JUNCTION, VERMONT, where the officers weighed the marijuana on a certified Toledo 200 pount scale which had been certified by the State of Vermont on January 1, 1975; the officers noted the weight to the one hundred eighty pounds and six ounces; the marijuana was then transported back to the BURLINGTON evidence locked and placed therein for safe-keeping;

"6. That on or about July 22, 1975, the evidence was removed from the evidence locker; that one plastic bag of marijuana was weighed and sealed by Agent BURTTRAM, witnessed by Agent HANDOGA; that representative samples were taken from the four larg squares of marijuana; that the samples were weighed and sealed by Agent BURTTRAM and witnessed by Agent HANDOGA:

"7. That on July 22, 1975, the plastic bag and the representative samples were sent to the Northeast Regional Laboratory, New York, New York, for chemical analysis, and that the remaining marijuana was replaced in the evidenc-locker for safe-keeping;

"8. That on October 23, 1975, this remaining quantity of marijuana was taken by Special AGent BURTTRAM and Special AGent HANDOGA to the Vermont Medical Center, Burlington, Vermont, and that this quantity of marijuana was destroyed by "burning; that he and Agent HANDOGA remained while the evidence was consumed and observed Mr. James HARVEY, Chief Engineer, Vermont Medical Center, lock the incinerator entry door before departing.

"It is further stipulated and agreed to by and between counsel for the above-captioned defendant and the United States, that if called as a witness, a representative of the WAITSFIELD-FAYSTON Telephone Company would testify that Government's Exhibits #8 are copies of toll records for telephone number 802-496-3175, listed to RICHARD PERKINS, WAITSFIELD, VERMONT. He would further testify that these records are compiled at the time of the events recorded therein, in the course of the regularly-conducted business activity of the WAITSFIELD-FAYSTON Telephone Company and that it is the regular practice of that office to maintain these records.

"It is further stipulated and agreed to by and between counsel for the above-captioned defendant and the United States, that if called as a witness, a representative of the New England Bell Telephone Company, would testify that Government's Exhibits #9 are copies of toll records for telephone numbers 802-622-8206 and 802-622-8285 listed to ANN CURTIS and ROBERT MARCHAND, 130-A, New County Road, GUILFORD, VERMONT. He would further testify that these records are compiled at the time of the events recorded therein, in the course of the regularly-conducted business activity of the NEW ENGLAND BELL TELEPHONE COMPANY and that it is the regular practice of that "office to maintain these records."

And at this time, Your Honor, and pursuant to that stipulation, I would like to offer Government's Exhibit #9, which I have marked 9-A, as exhibits in evidence. These are the records of the last two telephone numbers that I read listed to ANN CURTIS and ROBERT MARCHAND, 622-8206 and 622-8285.

MR. WEINBERG: No objections.

MISS JACOBSEN: I would also like to offer Government's Exhibit #8, Your Honor, which are toll records for RICHARD PERKINS' phone, 493-63175, strike that, 496-3175.

THE COURT: Is there any objection to Government's #8?

MR. WEINBERG: No, Your Honor.

THE COURT: Government's #8 and #9 will be received.

MISS JACOBSEN: At this time, Your Honor, the Government would call VICTOR ROY, Junior.

VICTOR ROY, Junior, having been recalled as a witness, was warned that he was still under oath and further testified on his oath as follows:

DIRECT EXAMINATION BY MISS JACOBSEN:

Q. Would you state your full name for the record, please?

A. Victor Roy.

Q. And where are you living now, Mr. Roy?

A. I am living in DILLON, COLORADO.

Q. And are you employed at this time?

A. Yes, I am.

Q. How are you employed?

A. I am a skiing instructor at Copper Mountain.

Q. And in July of 1975, were you living in Vermont?

A. Yes, I was.

Q. Where were you living?

A. My address was Box 524 Moretown, Vermont.

Q. And at that time were you living in the same house as RICHARD PERKINS?

A. Yes, I was.

THE COURT: Will you bring the microphone closer to you, Mr. Roy, so we won't have difficulty hearing you?

A. I'm sorry, is that better?

Q. Yah, I think you should be sure to speak loudly enough so that everybody can hear you.

A. I don't think it is on. It is on now.

Q. Okay, be sure you talk into that mike so he can -

A. Can you hear me now?

(Last question read aloud by the Reporter)

Q. Now Mr. Roy, on July 18th, 1975, were you arrested for taking part in an attempted sale of marijuana in Burlington, Vermont?

A. Yes, I was.

Q. And did you become, or did you subsequently plead guilty to a federal indictment charging you with possession of marijuana with intent to distribute?

A. Yes.

Q. Were you sentenced in Federal Court on that charge?

A. Yes.

Q. And what was your sentence?

A. My sentence was two thousand dollars fine and three years, suspended, or, sentence, - imposition of sentence was ssuspended for a period of three years.

Q. And are you presently on probation for that?

A. Yes.

Q. Now, I'd like you to recall the details of what took place on July 18, would you tell us where you obtained the marijuana that you later attempted to sell?

A. The marijuana was obtained in Brattleboro, Vermont.

Q. And can you tell us who you got it from?

A. The marijuana was obtained from a fellow named "Big Foot".

Q. And is that the only name you know that person by?

A. "Big Foot" or Bob.

Q. All right now, did you go down to Brattleboro by yourself to get the marijuana?

A. No, I went down with Richard.

Q. Richard, who?

A. Richard PERKINS.

Q. All right, did you drive down with RICHARD in his car?

A. Yes.

Q. All right and would you tell us how that meeting was set up?

A. How the meeting was set up?

Q. Yah, you drove down to Brattleboro to get some marijuana, how did you decide to do that?

A. Well, from series of, - from telephone calls, we had arranged to pick up a certain amount of marijuana from the Big Foot fellow and we arranged to meet there and we picked it up there.

Q. And did you call Big Foot?

A. Yes.

Q. When you were making those arrangements, did you have a telephone number that you could use to reach Big Foot?

A. Yes, there was a telephone number.

Q. All right, where did you get that phone number?

A. He had given it to me.

Q. Now, when you drove down to Brattleboro with Richard, where did you go?

A. We went to Howard Johnson's down there.

Q. And what did you do when you got to the Howard Johnson's?

A. Just waited for him to show.

Q. Do you remember what time of day that was when you were there?

A. Probably late morning maybe.

Q. And how long were you waiting before Bob or Big Foot showed up?

A. I really can't say for sure how long it was. A period of time, I really can't really recall explicitly. It was a while ago.

Q. Do you remember feeling that it was a long time or did you feel it was a short period of time then, do you have any recollection?

A. I wouldn't say it was a short period of time. There was a wait but it wasn't any really extended wait.

Q. Did you do anything while you were waiting?

A. Had some food and you know, had some coffee.

Q. Do you remember if you made any phone calls while you were waiting?

A. I think I might have made some phone calls.

Q. Do you know who you might have called?

A. I really can't recall. I really can't recall at this point.

Q. Can you recall now the number that you used when you wanted to get in touch with Bob?

A. Bob?

Q. Big Foort, - the person who gave you the marijuana.

A. No, I can't recall that telephone number.

Q. Did you know the number at that time in July of 1975?

A. I probably did, yes.

Q. I'd like to show you Government's Exhibit #8 and ask you to look at the second line from the top.

A. Uh huh.

Q. Isn't that the number that you used to call Bob?

A. Bob, who?

Q. The person who supplied you with the marijuana?

A. I can't say one way or the other now. This is quite a while ago and I really can't say. You know, I don't recall phone numbers.

Q. Looking at that phone number, doesn't refresh your recollection about what number you used to call Bob?

A. No.

Q. How often would you say you called him?

A. Not very often.

Q. Well, about how often? How many times did you call him, one? Did you call him five times, did you call him twenty times?

A. Over what period of time, are we speaking now?

Q. How long did you know him?

A. How long did I know him?

Q. Uh huh.

A. I knew him from the past and was obtaining marijuana from him while I was going to college and then you know, lost contact and then in that spring I, you know, met him and arranged contact with him. Nothing extensive.

Q. Do you remember late in that spring you met him, do you remember the month?

A. Well, it was probably March or April preceding March or April of B75, because I was skiing down in the Mount Snow area.

Q. From that time until July 18, 1975, about how many times would you have called him?

A. Oh, not too many. I can't put a number on it, but you know, not too many times. We weren't in frequent touch.

Q. Would you say you ever called him more than once on the same day?

A. I really can't recall. You're asking about something that happened two years ago. That's a long time ago.

Q. All right, Mr. Roy, I am going to turn to the fourth page of Government's Exhibit #8 and ask you to look at the top of the page and look for that same phone number.

A. (No response).

Q. That you saw on the front. All right, what was the phone number that you were looking at on the first page?

A. I don't know which one are we asking, this one.

Q. Right.

A. 622-8206.

Q. All right now, look at the top part of that fourth page.

A. Uh huh.

Q: See how many times you see that phone number there.

A. It's on here three times.

Q. All right, would you under-line it every time it appears, please?

A. (Doing so).

Q. All right now, I'm going to ask you to look at the eighth column at the top of the page.

A. Uh huh.

Q. Next to the last two times you under-line that phone number.

A. Okay, right here?

Q. Right.

A. Okay.

Q. Would you tell us what the heading on that column is?

A. Says "from number."

Q. All right now, will you read those two lines next to the numbers that you called?

A. Says Brattleboro, Vermont.

Q. Does it say that on both lines?

A. Yes, it does.

Q. So both those calls were made from Brattleboro, Vermont?

A. That's right.

Q. July 18, 1975?

A. (Nodding)

Q. Is that right?

A. Yes, that is right there.

Q. And you were in Brattleboro, Vermont on July 18, 1975?

A. Yes.

Q. And you called those numbers on that day?

A. Yes.

Q. All right now, did there come a time when Bob or Big Foot met you at the Howard Johnson's?

A. Yes.

Q. All right, would you tell us what happened there?

A. We asked if he had the marijuana and he said, "yes" and to follow him just around the corner to this little rest area, turn-out, and we pulled into there and he put the marijuana in the car.

Q. Well, was he alone?

A. No, he wasn't alone.

Q. Do you know who was with him?

A. No, I don't.

Q. Had you ever seen that person before?

A. No, I hadn't.

Q. Do you recall what kind of car Bob was driving that day?

A. No, I really didn't make a note of it, it happened very fast that was, it was just a white, - white -

Q. When you got to the rest area, -

A. Uh huh.

Q. Would you tell us in a little more detail, what happened. Was there any conversation?

A. Yes, there was a conversation pertaining to, you know, when the payment was to be made and the consequences if it wasn't made and it wasn't, you know, it wasn't too, - we didn't spend much time there.

Q. And whar was the talk about the payment? How much were they looking for?

A. I don't recall the figure but I know it was supposed to be made either that night or the next morning.

Q. And after that conversation then, what did they do?

A. They just put it in the car and they were gone. So were we.

Q. How much did they - were you finished? I'm sorry.

A. Yes, I was finished.

Q. How much did they put into your car?

A. I think it was about 180 pounds.

Q. Can you tell us how that was wrapped or what it looked like?

A. It was in four huge blocks, in garbage bags.

Q. Were there any marks on it of any kind?

A. Yes, I believe there was some.

Q. I'd like to show you Government's Exhibit #2 and ask you if you can identify that?

A. That looks like the same.

Q. The same what?

A. The same marijuana.

Q. That looks like the four bales of marijuana that was in the car?

A. That looks like that.

Q. After that was put into your car, what did you do?

A. Drove to, back to Moretown, Vermont.

Q. And then what happened, were you going to do anything about that marijuana or going to keep it for yourself?

A. No, we were going to sell it to someone up in Burlington.

Q. And did you subsequently try to sell it to someone in Burlington?

A. Yes.

Q. And what happened when you did that?

A. Well, he was a Drug Enforcement Officer. He didn't really want to buy it.

(Laughter).

Q. So what did he do?

A. He arrested us.

Q. Now, was July 18th, the first time you had ever seen Bob?

A. Bob?

Q. Big Foot?

A. Okay,

Q. Your supplier.

A. That's not the first time that I had ever seen him.

Q. Okay, can you remember when the first time was?

A. When the first time I had ever seen him?

Q. Uh huh.

A. Phew, that was while I was in college in Amherst, Massachusetts area. We used to go down to that area and kind of party out and go to bars down there. It's a pretty jumping place. A lot better than Lowell, Massachusetts, I can assure you.

Q. Do you remember when that was? Can you put a year on it?

A. No, I can't even do that.

Q. When were you in college?

A. From, - I graduated in June 1971, June of 1971.

Q. So you met this person sometime before that?

A. Yes, just casual, you know, a bar-type thing.

Q. And did you stay in touch with this person?

A. No, not really.

Q. Did you lose touch for a long time?

A. Uh huh.

Q. All right and after you lost touch, did you subsequently met this person again?

A. Well, as I said before, I had run into him while I was skiing in Mount Snow area in a bar again. You know, had a little conversation.

Q. When you met him that time in the bar, was he alone?

A. I really don't recall. He might have had a girl with him, but you know, in a bar it is a crowded place, - can't really tell who is with who.

Q. Do you recall -

A. Especially in the Mount Snow area.

Q. Do you recall ever testing before about meeting this person in Brattleboro in a bar?

A. Have I ever testified about meeting him before?

Q. (Nodding)

A. I believe so.

Q. And do you recall saying at that time that he was with someone else?

A. I think maybe it is on the Grand Jury record that -

Q. Do you recall saying it at that time, before the Grand Jury, that he was with someone else?

A. Yes.

Q. And who was he with at that time?

A. I don't know, with a girl.

Q. What was that girls' name? -

A. I really don't know but it could have been ANN.

Q. Do you recall testifying Mr. Roy before the Grand Jury in Vermont on July first, 1976?

A. Yes.

Q. And do you recall being asked these questions and giving these answers: "When you first met him on the first occasion down in Brattleboro, did he have a female person or associate with him?" Answer: "There was a girl with him, yes." Question: "Do you recall what her name was, or what part of the name you got?" Answer: "I think ANN." "Do you remember giving those answers to those questions?

A. Yes.

Q. Was there a girl named ANN with him on that day when you saw him?

A. I, now we are referring to Big Foot and the time I had met him down in Brattleboro, just a casual, nothing was said, I just ran into him.

Q. Right.

A. Now, truthfully, I really don't recall whether Big Foot was with a girl.

Q. But you did testify before the Grand Jury that he was with a girl, did you not?

A. That testimony shows that.

Q. And were you testifying truthfully before the Grand Jury?

A. Well, I must say that I was misleading the Grand Jury to believe certain things.

Q. Are you telling us that you were not telling the truth to the Grand Jury, Mr. Roy?

A. Well, I don't believe I told an out-right lie, but I probably had led the Grand Jury to believe certain things.

Q. So that you were not giving truthful testimony?

A. Not completely truthful.

Q. Did Big Foot give you a telephone number at that time?

A. At what time?

Q. When you saw him in Brattleboro in the bar?

A. Yes.

Q. Did you ever use that number to call Big Foot?

A. On a few occasions, yes.

Q. Did you ever talk to ANN when you called Big Foot at that number?

A. No.

Q. Did you see Bob or Big Foot again after you saw him that time in Brattleboro?

A. Yes, I had seen him oh, maybe one or two other occasions.

Q. All right, would you describe what happened on those occasions, please?

A. Well, I, on one occasion, we had met just for a brief period of time at the Springfield Howard Johnson's. Just to discuss a few things relative to maybe getting some marijuana from him.

Q. And did you arrange any other meetings with him to get some marijuana from him?

A. Well, we had made a purchase from him after that.

MR. WEINBERG: Objection, Your Honor, 404.

THE COURT: We will allow the question. If there is an objection, it is over-ruled.

MR. WEINBERG: Your Honor, so I won't have to interrupt the testimony, could I have a continuing objection to the testimony about this incident?

THE COURT: No, I think in order to properly preserve your objection to the questions, that should be done as the questions are asked.

MR. WEINBERG: All right, I'll object before he answers.

THE COURT: The objection is over-ruled.

Q. Do you recall the question, Mr. Roy?

A. No.

(LAST QUESTION READ ALOUD BY THE REPORTER)(ANSWER ALSO)

THE COURT: the court will allow the answer to stand.

Q. How many different occasions, Mr. Roy, did you arrange to buy marijuana from Bob, Big Foot?

MR. WEINBERG: Objection, Your Honor.

THE COURT: Objection is over-ruled.

A. There were two occasions prior to our arrest.

Q. And would you describe the first of those occasions please, would you tell us how that was set up and where you went?

MR. WEINBERG: Objection, Your Honor.

THE COURT: Objection is over-ruled.

A. Well, just got in touch with Big Foot and arranged to met him at the Springfield Howard Johnson's and you know, got some marijuana from him.

Q. Did you meet him there?

A. Yes.

Q. And did you get the marijuana from him right there, or did you drive somewhere to get it again, or how did that happen?

A. I really don't recall. Maybe I went with him to pick it up, or wherever he had it.

Q. What happened on the second occasion when you obtained marijuana from him?

A. About the same procedure, jsut very short, same type of thing.

Q. Did you call him ahead of time?

A. Yes.

Q. And then you would go meet him some place that you had arranged?

A. Uh huh.

Q. And he would supply you with marijuana?

A. Uh huh.

Q. Have you spoken with this person Bob or Big Foot, any time since July 18th, 1975?

A. No.

Q. All right, have you spoken with anyone after you testified in the Grand Jury about your Grand Jury testimony?

A. Have I spoken to anyone about my Grand Jury testimony?

Q. Uh huh.

A. Not about the Grand Jury testimony.

Q. Did you ever call anyone or tell anyone that you had testified in the Grand Jury?

A. Well yes, a number of people knew.

Q. In July of 1976, this past July?

A. Right.

Q. Where were you living then?

A. In Warren, Vermont.

Q. And where was your house located in Warren, Vermont, relative to the post office?

A. Two houses down the street.

Q. All right now, Mr. Roy, I'm going to ask you to look around the court room here and I'd like you to tell me if you see Bob or Big Foot here or anyone who resembles him.

A. Here? Or anyone that resembles him?

Q. Uh huh.

A. I don't see him here.

Q. Do you see anyone who looks like him?

A. Anyone that looks like him? Well, there's probably a number of people here that might look vaguely like him.

Q. Mr. Roy, are you testifying here today under a grant of immunity from the Federal Government?

A. Yes.

Q. And are you telling the truth today?

A. Yes.

Q. And did you testify before the Grand Jury on July first, 1976?

A. I testified.

Q. And were you telling the truth to the Grand Jury that day?

A. Well, as I said before, I was misleading the Grand Jury to believe, influences, --

Q. Isn't it a fact, Mr. Roy, that you led the Grand Jury to think that you could identify Robert MARCHAND as the person who supplied you with the marijuana?

A. I guess that is what it came down to.

Q. And is that true, Mr. Roy?

A. Is it true that I misled the Grand Jury to believe that -

Q. Is it true that that is what you did, yes.

A. I would say, yes.

Q. Do you know Robert MARCHAND?

A. Yes, I do.

Q. How long have you known him?

A. Oh, for a few years.

Q. How many years?

A. I would say that I first met him back in 1971.

Q. You consider him a friend of yours?

A. He is, yah, he is an acquaintance, he is a friend.

Q. And did you see him frequently since 1972 when you first met him?

A. Frequently?

Q. Yah.

A. As being members of the community I lived in, you know, like back then, maybe I'd see him frequently.

Q. Did you socialize with him?

A. Yes, on occasion.

Q. And you were a friend of his?

A. Yes.

Q. And yet you led a Grand Jury to believe that this person - this friend of yours, was the one who supplied you with marijuana, is that right?

A. Yes, that's what it came out to be.

Q. Are you saying now that this person is not the one who supplied you with marijuana?

A. Yes.

Q. Mr. Roy, were you lying then or are you lying now?

A. Well, I am under a grant of immunity now. So, -

THE COURT: Well, I will point out to you, Mr. Roy, that you are under a grant of immunity concerning the substance of the matters thatyou testified to but you are not under a grant of immunity as far as perjury is concerned and I think you should have it abundantly clear and clearly understand that.

A. Uh huh.

MR. WEINBERG: If Your Honor Please, may I approach the Bench?

THE COURT: Yes.

(AT THE BENCH OUT OF HEARING BY THE JURY)

MR. WEINBERG: We would move for a mis-trial, Your

Honor.

THE COURT: The motion will be denied.

MR. WEINBERG: Very well, Your Honor.

MR. OTERI: I think, Your Honor, that Your Honor's instructions are so prejudicial on its face and in the eyes of the Jury as to this witness' testimony, that he can never be believed. In fact, his denial of knowledge or his denial of my client's guilt will be interpreted as an affirmation of my client's guilty, because of your instructions. Furthermore, I think there is impliedly within your instructions the concept that my client may very well have something to do with any perjury, if there is any, and I think I can't get over that with this Jury now, Judge.

THE COURT: Motion for a mis-trial will be denied.

MR. OTERI: Will you instruct that your statement was no infringment?

THE COURT: Yes.

(C MR. OTERI: Thank you, Your Honor.

(Bench conference concluded)

THE COURT: The Court's comments to Mr. ROY was made in line with, following his testimony concerning his testimony before the Grand Jury and his testimony today and it appeared to the Court that he might be laboring under some misapprehension concerning the effect of immunity. The Court felt it was appropriate to warn the witness on that point in what appeared to the Court perhaps to be a misunderstanding but the Court wants you to understand that the Court's comment in no way reflects on the substance of his testimony or on the truth or veracity of his statement and any statement which the Court made in this regard, does not bear on the innocence or guilt of the defendant, MARCHAND, in any way.

The Court merely did it out of an abundance of caution regarding this particular witness' rights under a grant of immunity that was previously made and the Jury in the last analysis, has the responsibility of determining the credibility of each and all of the witnesses who appear here and the statement which the Court made at this time in the context of the witness' testimony, is not to indicate to you in the least degree, how the court feels regarding the credibility of this witness, nor, the truth or falsities of any testimony that he has given. It was given in the light of the prior inquiry by the representative of the Government as it relates to his testimony before the Grand Jury and his testimony here today. You may proceed.

MISS JACOBSEN: Very well, Your Honor.

Q. Mr. Roy, is it true that this is the first time in fact, that you are telling the truth about that?

A. I am telling the truth now.

Q. And that is because you are testifying under a grant of immunity, is that right?

A. Well, yes.

Q. All right.

A. Because I had known what I made a prior statement.

Q. I didn't hear the whole thing.

A. Because I had known what I had made as a prior statement.

Q. And yes, you never came forward after you lied to the Grand Jury, you never came forward and said that wasn't true? Or, I made a mistake, or I said something that wasn't correct. Did you ever come forward and tell us that you had said something that was not correct?

MR. OTERI: Objection, Your Honor.

THE COURT: We will allow you to state your objection, Mr. Otteri.

MR. OTTERI: Your Honor, it was stated under oath before you that this very same testimony has been given in the past.

THE COURT: We will allow the present question.

A. Would you read that back?

(LAST QUESTION READ BY THE REPORTER)

A. No, I don't believe I did.

Q. So today is the first time you are telling the truth, is that right?

A. I believe that is what that would mean.

Q. When you talked to the Grand Jury and you indicated to them that Robert MARCHAND was the person who supplied you with the marijuana you got your friend in trouble, didn't you?

A. Well, I never thought that anything would come of this. I mean, I didn't think about Mr. MARCHAND until these pictures were put in front of me.

Q. Are you trying to get your friend out of trouble today, Mr. Roy?

A. I'm, I'm trying to tell you the truth.

Q . You didnt' tell the truth to the Grand Jury though, is that right?

MR. OTTERI: Your Honor, that has been asked.

THE COURT: Yes, sustain the objection to the pending question..

Q. Were you under oath when you testified to the Grand Jury?

A. Yes, I was.

Q. May I have a minute, Your Honor?

THE COURT: Yes.

Q. Mr. Roy, did you ever see ANN with Bob MARCHAND?

MR. OTTERI: If Your Honor Please, object to it.

THE COURT: Objection is overruled.

A. Did I ever see ANN with Bob MARCHAND?

Q. Yes.

A. Yes.

Q Were they friends?

A. Yes.

Q. Do you know if they were living in the same town?

A. Yes.

Q. Do you know if they were living in the same house?

A. I believe they probably were.

Q. When you testified before that Grand Jury in July, you testified that you saw Bob or Big Foot with Ann, is that correct?

MR. OTTERI: If Your Honor Please, this is the third time we have gone through those same questions on the same passage with the same questions and answers, Judge.

THE COURT: We will allow the questions.

A. What was that again?

Q. Do you recall that you testified in the Grand Jury that you saw Bob or Big Foot your supplier, with Ann?

A. That is the way the Grand Jury testimony reads.

Q. And is that the same ANN that you know as a friend or companion of Mr. Marchand?

A. No, you're saying that, - could you go over this line again? There is a fine line.

(QUESTION READ BY THE REPORTER)

A. The ANN that I was referring to in there was.

Q. It was the same one?

A. (Nodding)

Q. Do you know Ann's telephone number?

A. Not off-hand, no.

Q. Did you ever talk to ANN when you dialed the number to get Bob?

A. I might have.

MISS JACOBSEN: I have no further questions, Your Honor.

CROSS EXAMINATION BY MR. OTTERI:

Q. Mr. Roy, just a few things if I may, this thing with Ann?

A. Uh huh.

Q. The Grand Jury testimony that the prosecutrix referred to has you saying that when you first met Big Foot in Brattleboro, he had a female associate with him?

A. There was a girl with him, yes.

Q. Do you recall what her name or part of her name you got? "I think Ann," and now you have just been asked another series of questions about this Ann. Let me see if I understand what you said. The ANN that was with Big Foot when you met him in Brattleboro for the first time, now, have you got that person?

A. Yes.

Q. In mind? Is that the same ANN that, whom you have seen on other occasions with Bob MARCHAND or is it a different ANN?

A. Well -

Q. Or a different person?

A. Here's what I'm saying is that when I first met with this Big Foot character, there might have been a girl with him. I don't remember. It was a crowded bar atmosphere and I dind't know what her name was.

Q. All right now when you told the Jury, the Grand Jury, that he did have a female associate with him and that you think her name was Ann, were you positive of that, - were you misleading the Grand Jury, or were you outright lying to them?

~~A. Well, as I was saying before this, I apparently was~~

misleading the Grand Jury to believe a different thing.

Q. Let me ask you something. The ANN that is mentioned in this Grand Jury testimony, have you ever seen that ANN or that girl, if there was a girl with Big Foot, have you ever seen that person with Robert MARCHAND?

A. Okay, you are asking me if the girl, - I don't even know the girl's name, the girl that was with Big Foot, you are asking me if I had ever seen taht girl with Bob MARCHAND?

Q. Yah.

A. No, I haven't,

Q. Okay, thank you. Now, you have been asked if you ever called Mr. MARCHAND's home and spoken to his fiance, a girl named ANN, is that correct?

A. I was asked that.

Q. And you have answered "yes" is that correct?

A. Yes.

Q. You have spoken to the, this girl ANN that is Mr. MARCHAND's fiance?

A. Right.

Q. Okay now, sir, on the 18th of July, the prosecutrix, the U.S. Attorney, showed you some telephone calls that you made on July 18th, two of them in succession and another one earlier. Three calls that you made to a number in South Halifax, Vermont?

A. She showed me that.

Q. All right and she asked you if those calls were to Robert Marchand's phone, that was Mr. Marchand's phone, is that correct?

A. I don't remember if she had asked me that.

Q. She asked you if it was Big Foot's phone, is that correct?

A. Yes.

Q. Let me ask you a question, did you on July 18th, have any occasion to call Mr. Marchand?

A. Yes, I believe I might have.

Q. All right and can you tell us if you have any memory of why you called Mr. Marchand?

A. Well, it was probably to ask if he would want to purchase some of the marijuana that I knew I was getting that day.

Q. Is that what those calls on the 18th, that series of calls, were?

A. That is that that could be.

Q. All right now, let me ask you this. Did you talk to Mr. MARCHAND that day, the 18th?

A. I think I did.

Q. All right, did you talk to him about buying marijuana?

A. I believe I did.

Q. And can you tell us your memory of the conversation?

A. It was a long time ago but you know, I don't really remember what the conversation was.

Q. All right, let me go the other way. Did you sell Mr. Marchand any marijuana?

A. No.

Q. He didn't buy any of that?

A. No.

Q. Okay now sir, you were asked if this is the first time today, that you are telling the truth. You were asked the question about your conduct in the Grand Jury misleading them, you were asked if today is the first time you were telling the truth?

A. I was asked that.

Q. Do you remember that? All right now sir, let me ask you, have you had a chance between July first, 1976, the day you went in the Grand Jury and today, have you had an opportunity to testify in a trial before a Grand Jury, before a Jury, other than today?

A. No, this is the first time Ihave been before a jury.

Q. Okay, thank you. Now sir, I would ask you, Mr. MARCHAND, stand up, please?

(Mr. Marchand stood up)

Q. Just so there is no misunderstanding in anybody's mind, you said that there were a lot of people in this court room that looked like Mr. Marchand?

A. Yes.

Q. Can you point out some of them for us?

A. This gentleman right here.

Q. Would you stand up, please?

A. No, I was pointing back here.

Q. this one?

A. Yes, now earlier, I was asked to describe people with broad shoulders, people that were big.

Q. People that looked to you like MARCHAND or like the fellow - what's his name, Big Foot and not Marchand?

A. That's right.

Q. You picked him out as looking like Big Foot?

A. Yes, I picked him out as looking like Big Foot.

Q. Who else did you pick out as looking like Big Foot?

A. I picked him out?

MR. HUGHES: Me?

A. Well, you've got a broad build.

Q. And did you pick somebody else out?

A. Well, I picked you out.

Q. The big fat guy? Okay, all right now, thank you. Mr. Marchand will you stand up? The other four of us you picked out you said looked like this Big Foot, including Mr. Marchand, correct?

A. Correct.

Q. Now let me ask you straight out, no mistakes, is Mr. Marchand the fellow, Big Foot, who delivered the 180 pounds of grass to you in Brattleboro on July 18th, 1976?

A. No, that is not him.

Q. Thank you. Nothing further.

MISS JACOBSEN: We have no further questions of this witness.

MR. OTTERI: No questions, Your Honor.

THE COURT: the Court at this time will recess until tomorrow morning at 9:30. Again, the Court can't over-emphasize my prior instructions that I have repeated but you must not discuss the case with any person and that includes members of your family or anyone else and you must not read about the case or listen to any comments about the case that may be the subject of reporting in the media, either radio, television or the press and with that caution you will be excused until tomorrow morning at 9:30.

(This trial then at 4:20 p.m. 6 January 1977, adjourned until 9:30 a.m., 7 January 1977.)

THIRD DAY 7 January 1977 9:38 a.m.

THE COURT: The Government may proceed.

MISS JACOBSEN: Thank you, Your Honor. The Government at this time would call Special Agent James HARRIS to the stand.

J-A-M-E-S H. H-A-R-R-I-S, having been called as a witness by the Government, was duly sworn by the Clerk and testified on his oath as follows:

DIRECT EXAMINATION BY MISS JACOBSON:

Q. Could you state your full name again for the jury, please?

A. James H. Harris.

Q. Mr. Harris, how are you employed?

A. Special Agent for the Drug Enforcement Administration in Miami, Florida.

Q. All right and were you on duty in that capacity on August 24, 1976?

A. Yes, I was.

Q. And did you have to make any arrest in this case?

A. Yes, I did.

Q. Subsequent to the arrest of the defendant, Robert Marchand, did you seize any papers from his person?

A. Yes, I seized a telephone book.

Q. And what did you do with the papers you took?

A. I initialed and dated them and sealed them in an evidence envelope and later on mailed them to Special Agent HANDOGA in Burlington, Vermont.

Q. All right, Agent HARRIS, I show you an envelope that has been marked Government's Exhibit #11 for identification and ask you if you can identify that please?

A. Yes, I can.

Q. And would you describe it?

A. this is the telephone book and miscellaneous papers and the evidence envelope with case number and my name and the date, August 24, 1976.

Q. And when you took out the paper and telephone book before you and placed them in the telephone book, did you mark them in any way?

A. I put my initials and date, August 24, 1976.

Q. Now Agent HARRIS, I show you a piece of paper marked Government's Exhibit #11-A for identification and ask you if you can identify that paper?

A. Yes, sir, I recognize the paper of my initials and date, 8-24-76, the piece of paper that was in Mr. Marchand's papers.

Q. And that was within the papers you took from Mr. Marchand that day?

A. Yes, sir.

Q. All right, at this time I'd like to offer Government's Exhibit #11-A as evidence.

MR. WEINBERG: The only objection goes to the pre-trial objection.

THE COURT: Pardon?

MR. WEINBERG: The only objection is based on the pre-trial motions which were decided by Your Honor.

THE COURT: Government's #11-A is received.

Q. Agent HARRIS would you read what is contained on Government's #11-A?

A. Starting from the top left-hand corner Letter "T" dash, the word "Bird" another dash. Second line starts dash pictures of Ann and or plus Bob. That is a period then another dash says "Met me at U. Mass bar." Then at or under "Mass" says "bar, b-a-r" under-lined. Then there is the letters, a-p-p-r-o-x then the name "Warren" then it says, "2nd house after P.O." I believe the next word "Mars" maybe it is "Mass" Hotel. Then the last thing is my initials and the date 8/24/71.

MISS JACOBSON: I have no further questions.

MR. WEINBERG: No questions.

MISS JACOBSON: May we proceed, Your Honor?

THE COURT: Yes, you may proceed.

(Agent Harris having been excused, withdrew from the stand)

MISS JACOBSON: We would call Special Agent THEOBORE HANDOGA.

T-H-E-O-D-O-R-E H-A-N-D-O-G-A, having been called as a witness by the Government was duly sworn by the Clerk and testified on his oath as follows:

DIRECT EXAMINATION BY MISS JACOBSON:

Q. Would you please give us your name for the record?

A. Theodore Handoga.

Q. And how are you employed, Mr. Handoga?

A. I am a Special Agent for the Drug Enforcement Administration.

Q. How long have you held that position?

A. I have been in the State of Vermont for approximately two and a half years.

Q. And were you working for the Drug Enforcement Administration before you came to Vermont?

A. Yes, I was.

Q. For how many years?

A. I have approximately ten years on the job.

Q. All right, would you give the jury a description of your duties?

A. I am in charge of the enforcement PO's for the Drug Enforcement Administration in the State which covers criminal matters and also compliance matters within the State.

Q. Now Agent HANDOGA were you on duty on July 18, 1975?

A. Yes, I was.

Q. Were you on duty during the evening hours and the night time hours of that day?

A. Yes, I was.

Q. All right, would you tell us where you were working?

A. I was working in South Burlington, Vermont.

Q. All right, would you tell us where you were working?

A. I was working in South Burlington, Vermont.

Q. And would you describe for the Jury what sort of work you doing at that time?

A. We had an operation going whereby Special Agent BURTTRAM was working under cover and was expecting a shipment of approximately 180 pounds of marijuana to be delivered to him at the parking lot of the Holiday Inn in South Burlington. Myself and other officers conducted surveillance of Agent BURTTRAM at that time.

Q. And what did you observe when you were conducting a surveillance?

A. We observed Richard PERKINS arrive in his vehicle with Victor ROY parked across the street from the HOLIDAY INN in the HOWARD JOHNSON's lot. Mr. PERKINS then went to the HOLIDAY INNN and met with Agent BURTTRAM, came back to his car, took a sample of marijuana over to him. Subsequently he came back, got in his car and drove into the parking lot of the HOLIDAY INN where he delivered 180 pounds of marijuana to Agent BURTTRAM. Victor ROY during this time of delivery was standing in the parking lot across the street in the HOWARD JOHNSON'S observing there what was going on.

Q. Once the attempted delivery was made to Special Agent BURTTRAM, what happened?

A. Agent BURTTRAM and other agents in the HOLIDAY INN effected the arrest of RICHARD PERKINS, myself and several other officers arrested Victor ROY . At the time of his arrest he attempted to warn Mr. PERKINS of our presence near.

Q. And after you had arrested Mr. PERKINS and Mr. ROY was anything seized from them?

A. The marijuana was seized.

Q. And can you describe the condition of the marijuana that was seized at that time?

A. Yes, it was consisting of four large bales, each weighing in the vicinity of 45 pounds in heavy, clear plastic, banded with a piece of duct tape, silver, with numbers written to the duct tape.

Q. Agent HANDOGA, I'd like to show you Government's Exhibit #2, 3, 4, 5 and 6 and ask you if you can identify those?

A. Yes, sir, these are pictures that were taken of the marijuana seized from Mr. PERKINS and Mr. ROY.

Q. And do those pictures show the marijuana in the same condition that you seized them?

A. Yes, it does.

Q. Would you tell the jury what was done with these bales of marijuana once they were taken by you and Agent BURTTRAM?

A. They were returned to the, our office and placed in the evidence locker, subsequently samples were taken - representative samples were taken from each one of the bales. These were placed in an evidence envelope and mailed to the Northeast Regional Laboratory where they were analyzed. Upon receiving a confirmation that the material was analyzed and was in fact marijuana we then made arrangements to destroy the bulks of the marijuana in an incinerator at the Medical Center Hospital.

Q. And is that the normal procedure for your office when you received large samples, large quanitities of the marijuana?

A. Yes, it is.

Q. Agent HANDOGA, I'd like to show you now Government's Exhibit #10 for identification and ask you if you can identify that please?

A. Yes, this is Exhibit #1 in the case and it consists of the sample delivered to Agent BURTTRAM on the night of the 18th. And on there is a case number, the date, sealing official who was Agent BURTTRAM and the witnessing official which was myself.

Q. And was that package sealed on July 18, 1975?

A. It would have been the 18th or the following day.

Q. All right now, I show you Government's Exhibit #14, -

THE COURT: You referrred to Government's #1 or is it ten or one?

A. It is ten.

Q. This is Government's Exhibit #10 for identification. It was marked as Exhibit #1 by the Drug Enforcement Administration when it was sealed?

A. Uh huh. This is Government's Exhibit #14-A through H and it consists of the representative samples that were taken from each of the large bales and mailed to the NOrtheast Regional Laboratory as it was sealed by Agent BURTTRAM and again witnesses by myself.

Q. And Agent HANDOGA are these samples Government's Exhibit #10 for identification and Government's Exhibit #14-A through H for identification in fact, analyzed by the chemist, Gladstone Griffith?

A. Yes, they are.

Q. At this time, Your Honor, I'd like to offer this into evidence.

MR. WEINBERG: Objection, there is no connection of that evidence with my client, Mr. Marchand.

THE COURT: Objection is over-ruled, we will receive it, both the offers.

Q. Agent HANDOGA are you familiar with the address of 130-A New County Road, Halifax, Vermont?

A. Yes, I am.

Q. And have you ever been there yourself?

A. Yes, I have.

Q. Have you been in that building?

A. Yes, I have.

Q. Would you describe what kind of building that is, please?

A. It is a single dwelling house, two floors, consisting of approximately 8 or 9 rooms with one out building, a barn-type, building.

Q. Are there separate apartments in this building?

A. Building, no, there are not.

Q. Now Agent HANDOGA, have you had opportunities to interview
RICHARD PERKINS?

A. Yes, I have.

Q. And during the course [illegible] of those interviews did
you have occasion [illegible]ow him a series of photographs?

A. Yes, I did.

Q. And would you tell the Jury the purpose behind your showing him the photographs?

MR. WEINBERG: Objection.

THE COURT: State your objection, Mr. Weinberg.

MR. WEINBERG: Thank you, Your Honor.

THE COURT: I said, will you state your objection.

MR. WEINBERG: My objection is that this is one of the relevant hearsay and there is no foundation for Mr. Perkins that this is going to be anything inconsistent to what Mr. Perkins has already testified to, so it is redundant.

THE COURT: What do you claim for it?

MISS JACOBSON: The Government is trying to show in support of Mr. Perkins' testimony that he did in fact select the picture out of a series of pictures that Agent HANDOGA showed to him.

THE COURT: We will allow the inquiry to proceed.

Q. Agent HANDOGA what was the purpose of showing these pictures to Mr. Perkins?

A. The purpose was to identify the individual who had supplied the 180 pounds of marijuana to him, firstly, he identified as the person called "Big Foot" .

Q. I'd like to show you a group of pictures that have been marked as Government's Exhibit #2, Government's Exhibit #13, Defendant's Exhibit "C", Defendant's Exhibit "D", Defendant's Exhibit "E", Defendant's Exhibit "F", Defendant's "G", Defendant's "H", Defendant's "I", excuse me, Defendant's "J", Defendant's "K", Defendant's "L", Defendant's "M", Defendant's "N", Government's #19 and Defendant's "O" and I will ask you if those are the photographs that you showed to RICHARD PERKINS?

A. Yes, they are.

Q. And where were you when you showed the photographs to him?

A. I believe it was in this building.

THE COURT: Pardon?

A. I believe it was in this building.

THE COURT: You mean the Federal Building here?

A. Yes.

Q. Do you recall the date, Agent HANDOGA?

A. Yes, I could tell you the date. It would be on the 26th of April 1976.

Q. And did RICHARD PERKINS select a photograph from that series?

A. Yes, he did.

Q. And would you show us which photograph he chose?

A. (No response)

MR. WEINBERG: Same objection, Your Honor.

THE COURT: We will note your objection. The Court's ruling will stand.

A. It was this photo here, Government's Exhibit #19.

Q. How do you know what photograph Richard Perkins selected?

A. HIs initials are on the back and with the date of April 26, 1976.

Q. And who is that photograph of, Agent HANDOGA?

A. Robert MARCHAND.

MISS JACOBSON: I have no further questions, Your Honor.

CROSS EXAMINATION BY MR. WEINBERG:

Q. Agent HANDOGA, Richard Perkins was arrested on what date?

A. July 18, 1975.

Q. And these photographs were shown to him, when?

A. April 26, 1976.

Q. About nine months afterwards?

A. That's correct.

Q. He was cooperating as of a week after the arrest, was he not?

A. Yes.

Q. By August first, about 8 or 9 months before the pictures were shown he was a cooperating witness, is that correct?

A. Yes, he was.

Q. Okay now, Mr. PERKINS also identified and initialed the second photograph in the pictures that were shown to you by the Assistant U.S. Attorney Jacobson, is that right?

A. Yes.

Q. That was a photograph of who?

A. (No response)

Q. What was the man's name, if you know?

A. I'm not quite sure whether it was Dan McGinn or Daniel Cronin. I can tell you if I saw the picture.

Q. Okay, I show you Defendant's Exhibit "C" and ask you whether or not that is a photograph selected by Richard Perkins in April of 1976?

A. Yes, it is.

Q. And what is the identity of this individual?

A. It is either Daniel Cronin or Daniel McGinn, I'm not quite sure.

Q. Is there anything that would refresh your recollection, sir?

A. Not at this particular time.

Q. I show you Government's Exhibit "E" and ask you whether or not you can identify that photograph?

A. Yes.

Q. Who is that?

A. I believe he is Daniel McGinn.

Q. So the Defendant's Exhibit "C" is not Daniel McGinn, is that correct?

A. No, that is probably Daniel Cronin.

Q. Was Mr. Cronin, Mr. Perkins identified on April of 1976 and which picture he initialed, is that correct?

A. That's right.

Q. There is no initial on the picture of Daniel McGinn?

A. No, sir.

Q. And it is fair to say your investigation has disclosed Mr. Cronin had no involvement in this investigation, is that fair to say that your investigation disclosed Mr. Cronin was not at Brattleboro on July 18, 1975, is that correct?

A. No, it is not correct.

Q. You have evidence that Mr. Cronin was in the passenger seat of the car with this man "Big Foot" on July 18, 1975 in Brattleboro?

A. No, I don't have evidence.

Q. Mr. Cronin's never been charged with a crime, has he?

A. Not to date.

Q. No indictment has been returned against him?

A. Not as of this date, no.

Q. The photographic identification of Mr. Perkins, Mr. Cronin being Big Foot on the 18th did not lead to any definite charges?

A. Against Mr. Cronin, that's correct.

Q. Thank you, sir. Now, after the photographic identifications by Mr. Perkins, there was never attempts to, by you, to have a line-up, was there?

A. No, there was not.

Q. By a line-up, that is when -

MISS JACOBSON: I object to these questions.

THE COURT: We will allow the question on cross-examination.

Q. In a line-up when the Government has 7 or 8 people standing on a stage and witnesses are asked to identify who was the person they saw at that particular time, is that right?

A. That's correct.

Q. You have been a Drug Enforcement Administration officer about ten years?

A. Yes, sir.

Q. You were expert in the identification procedures, are you not?

A. Somewhat, yes, sir.

Q. You know a line-up is more reliable way of determining identification than is the identification photographs, don't you?

MISS JACOBSON: Your Honor, I object to that question.

THE COURT: We will allow you to develop on redirect any facts that you may care to. We will allow the cross-examination to pursue on the line that is being taken.

MISS JACOBSON: Your Honor, may we approach the bench?

THE COURT: Yes.

(AT THE BENCH, OUT OF HEARING BY THE JURY)

MISS JACOBSON: Your Honor, I would object to those questions on the grounds that the Government is not under any obligation to conduct line-ups when the defendant is now available and when he is not incarcerated.

THE COURT: Well you can show that but as far as the objection is concerned, the Court will over-rule your, the Government's objection to the question as pending.

MISS JACOGSON: Thank you.

(CONFERENCE AT THE BENCH CONCLUDED)

Q. I will ask you again, sir, on the basis of your experience and training as a law enforcement officer for over ten years, you are aware the line-up, when the persons themselves are before a witness, are more reliable way of determining identification than are the selection of the photographs, isn't that correct?

A. That's right.

Q. And April of 1976 after the photographs of Mr. MARCHAND and Mr. CRONIN were initialed by Mr. PERKINS, did you ever ask Mr. MARCHAND to participate in a line-up?

A. No. It's an on-going investigation.

Q. Did you ever ask Mr. MARCHAND to participate in the line-up?

A. No.

Q. You knew where he lived, did you not?

A. Yes, I did.

Q. YOu made no attempt to ask him whether he would voluntarily come in a line-up before Mr. PERKINS, to determine whether Mr. PERKINS would in fact, identify Mr. MARCHAND as "Big Foot" isn't that right?

A. Didn't ask him to come to the State of Vermont, yes, sir.

Q. Government's Exhibit #19, the photograph of Mr. MARCHAND that was selected by Mr. PERKINS, that is a photograph of a size different than all but one of the remaining photographs, isn't that correct?

A. Yes, that's correct.

Q. Did you make any attempts to get 10 or 15 other photographs of this size, sir?

A. No, I didn't have any others available.

Q. Do you know how old Mr. MARCHAND was when this photograph was taken?

A. No, I did not.

Q. Do you know whether that was a high school graduation picture?

A. No, I do not.

Q. But it is fair to say you had no mug shots of Mr. MARCHAND in your files because he's never been arrested before, isn't that so?

A. That's correct.

Q. And you received this photograph from the chief of police from the town Mr. MARCHAND was residing in 1975, isn't that so?

A. That is correct.

Q. Did you ever ask him for more photographs of this kind, be it a graduation picture or whatever?

A. No.

Q. - to be included in this identification displacement?

A. He sent me all the pictures he had.

Q. Which was two pictures, is that right?

A. I believe so, no, there were some additional pictures but those two, yes.

Q. Okay, may I have a moment? .... I have no further questions. Thank you, Agent Handoga.

REDIRECT EXAMINATION BY MISS JACOBSON:

Q. Agent HANDOGA, you testified that you showed these pictures to Richard PERKINS in April of 1976, is that right?

A. That is right.

Q. Had you talked to Richard PERKINS before April of 1976?

A. Yes, I had.

Q And had he given you a description of Bob or "Big Foot" before that time?

A. Yes, he had.

Q. Would you tell us when was the first time he gave you a description of the person who supplied him with marijuana?

A. It was within two weeks after the arrest on the 18th of July 1975.

Q. And after that first occasion when he gave you a description did he subsequently give you a drawing that he had made?

A. Yes, he did.

Q. I'd like you to take a look at Government's Exhibit #7, is that the drawing that Richard PERKINS gave you?

A. Yes, this is the drawing that he sent to me.

Q. And who is that drawing labeled as?

A. Big Foot.

Q. When did he give you this drawing?

A. It was approximately one month after his arrest.

Q. Now, when he was looking at these pictures, what did you ask him to look for when you asked him to look at those pictures?

MR. WEINBERG: I object Your Honor. No foundation has been laid for the questions of Mr. PERKINS and Mr. PERKINS no longer is available for rebuttal if Mr. Handoga's answers are being inconsistent with Mr. Perkins'.

THE COURT: We will allow the inquiry, Mr. Weinberg. Is Mr. Perkins available?

MISS JACOBSON: He could be, Your Honor. I believe he has already testified and been cross-examined on this issue.

THE COURT: In any event, we will allow the question and if there is any problem about recalling Mr. Perkins, we will deal with that at the time.

A. I had asked Mr. Perkins if he could identify the two individuals that had delivered the 180 pounds of marijuana to him in Brattleboro, Vermont.

Q. And he selected Government's Exhibit #19 and Defendant's Exhibit "C" as the two people that he remembered?

A. Yes.

Q. Agent HANDOGA, why didn't you ask Mr. MARCHAND to participate in the line-up?

A. At the time the photos were shown to Mr. Perkins, I was still conducting an active investigation on Mr. MARCHAND.

Q. And was Mr. MARCHAND in jail at that time?

A. No, he was not.

Q. Did you feel there was any necessity at that time to conduct a line-up?

A. No, it would have jeopardized the work that I was doing at the time had I done that.

MISS JACOBSON: I have no further questions, Your Honor.

RECROSS EXAMINATION BY MR. WEINBERG:

Q. Even after Mr. MARCHAND was arrested in August of 1976 you never asked for a line-up did you, sir?

A. No, I did not.

Q. That was after your investigation was no longer jeopardized, is that correct?

A. It is incorrect.

Q. Sir, if Mr. Perkins testified that in April of 1976 you asked him to select two photos that looked most like the two people who you saw in Brattleboro, July 18, 1975, would he be mistaken?

A. I had asked if he could identify those two people.

Q. If his recollection, you asked him to identify the two people, the two photographs that looked most like the two photographs that looked most like the two people whose full identity he didn't know who were in Brattleboro July 18, 1975, would he be mistaken?

A. (No response).

Q. If that was his testimony.

A. No I had asked him to identify those two people.

Q. So if he said his recollection is that you asked him to pick out the two photos that looked most like the people he remembered, he would be mistaken, is that right?

A. I feel that he -

MISS JACOBSON: Your Honor, excuse me, Agent, I would object to that. They speak for themselves. Mr. Perkins has already testified and Agent HANDOGA has answered this question already.

THE COURT: The Court will allow the question.

A. I feel he would be incorrect. I asked him to identify those two individuals, not the people that looked most like him.

Q. You have been an agent for ten years?

A. Yes, I have.

Q. Is part of your function as a drug enforcement agent, to write reports and take notes of interviews with witnesses, is that correct?

A. On occasion, yes.

Q. In fact you have a big manual which requires all kinds of note procedures and report procedures of each and every interview with a witness, isn't that right?

A. Not each and every interview, no, sir.

Q. Certainly the manual requires you to take reports at different times, to follow identification procedures involving a witness who might later come into court, is that right?

A. It is incorrect.

Q. Doesn't it usually take reports every time you interview witnesses who might come into court?

A. No, I don't usually take reports at each interview.

Q. You take them some times?

A. Some times.

Q. Do you take any notes or did you take notes of your interview with Mr. Perkins in April of 1976?

A. No, I did not.

Q. You didn't write down the dialogue at all?

A. I did not.

Q. YOu didn't write down in your report which photographs he selected?

A. No, I did not.

Q. You didn't write down which photographs he didn't select?

A. No, I did not.

Q. But on other occasions when you interviewed Mr. Perkins, you did take reports, is that correct?

A. I made a report on several occasions.

Q. Between April of 1976 and January of 1977 you have interviewed many witnesses, is that correct?

A. In this case?

Q. In many cases.

A. Some people.

Q. During the 7 months on the job as a D.E.A. Agent, is that correct?

A. Yes.

Q. YOu take reports of some of those interviews and haven't taken reports of others, is that correct?

A. That's correct.

Q. How long was your interview with Mr. Perkins on April 26, 1976?

A. Probably no more than ten minutes.

Q. Where did that interview occur?

A. I believe it was here, but I am not quite sure where.

Q. So you are testifying strictly from your recollection, not from any reports or notes you have written about this, unlike others, is that correct?

A. That is correct.

Q. You have a tape recorder do you not, Mr. Handoga?

A. Yes, I do.

Q. Some times you tape interviews, do you not?

A. I don't tape interviews.

Q. Some times you have the tape recorder dunning during an interview?

A. No.

Q. Never have the lights on during interviews?

A. Never.

Q. They would be mistaken if they observed it?

A. Well, I -

MISS JACOBSON: Objection. He is asking for a conclusion.

THE COURT: We will allow the question on cross-examination.

A. Yes, they would be mistaken.

Q. It is fair to say you didn't tape the interview with Mr. Perkins so we have an explicit record of what occurred, is that so?

A. That's right.

MR. WEINBERG: No other questions.

MISS JACOBSON: We have no further questions.

THE COURT: I believe that is all, Agent Handoga.

(The witness having been excused, withdrew from the stand)

MISS JACOBSON: That is the Government's case. We have no more witnesses to present.

THE COURT: Government rests. (10:12 a.m.)

MR. WEINBERG: We have a motion we would like to present to the Court.

THE COURT: THE Court will receive it. At this time, members of the Jury, we have some legal matters to take up in which we do not require your presence. The marshal will notify you when to return.

(At 10:12 a.m., the Jury withdrew from the court room)

The COURT: We will hear your oral motion.

WITHOUT THE PRESENCE OF THE JURY

MR. WEINBERG: Thank you, Your Honor. I am going to review the evidence in detail later, Your Honor, as it hasn't been a very long trial. The Government basically had two witnesses that came before the Court with any kind of primary evidence. It is a one-issue case, the issue being who is "Big Foot," who is the man who distributed the marijuana to Mr. Roy and Mr. Perkins.

Both of those witnesses stated in an in-court identification that Mr. Marchand was not Big Foot. It was stated explicitly with no equivocation.

Mr. Perkins informed the Court that on a prior occasion, he had made a photographic identification, a tentative one, a statement that this photograph is the one that most closely resembled Mr. Marchand. I asked him very carefully, you know, was this "Big Foot," was it a positive identification of the photograph and he said, "no, it wasn't." And Mr. HANDOGA impeached him and said it was a positive identification of the photograph.

That merely goes to Mr. Perkins' credibility, it doesn't go to substantive evidence. It's only an inconsistency. So all you have regarding identification which is the principle issue here, is one resemblance that it most resembles "Big Foot" in the photo, occurred months ago in April of 1976. But, when confronted with the human being in court the man said it wasn't him, and that is the evidence.

The toll records show acquaintanceship. That is not enough to go to a Jury, particularly when Mr. ROY explained he did know Mr. MARCHAND and was trying to sell him marijuana.

There was no other corroboration, there was no other circumstances sufficient to warrant a jury in finding that Mr. MARCHAND was the source of the marijuana.

We have researched the cases high and low. I have had three law students back at the office the last two days which Mr. Oteri and I hired and there is no case which was ever in the history of American jurisprudence allowed to go - that have gone to the jury that have been sustained by the appeals courts when the only identification testimony is an equivocal pre-trial photographic identifications.

Not to say that in the usual case there is even the equivocal in-court identification "it looks like him," "it resembles him," even then, the courts don't allow the case to go to the jury because the jury would have to speculate and conjecture and guess as to what was happening.

Here, the evidence, the only primary evidence, "Stand up. Is that Big Foot?" "No". There is no reliable evidence for the jury to base a verdict of guilty on. They would have to guess that the witnesses were mistaken and the rule is that even if they didn't believe Mr. Perkins, even if they didn't believe Mr. Roy and they just didn't believe that when they said he wasn't "Big Foot," there's still no affirmative evidence upon which they can rely for a verdict.

You know there is some cases which are similar but all these cases only have one side of the picture. They have the side of equivocal photographic identification. None of them have the other side of the coin which we have, which makes our case so different than the other cases and the other cases mentioned. I will give the Court the cites and our case is where the appeals court reversed, when a trial court allowed a jury to make a finding and the finding came back "guilty", Those cases and the two most prominent ones are U.S. versus KELLER, 512 Federal Second 182 Third Circuit, 1975 and The United States versus JOHNSON 427 F. Second, 957. JOHNSON was a bank robbery case.

THE COURT: 427 Fed Second?

MR. WEINBERG: Fed Second, yes, Your Honor, it is a Fifth Circuit case.

THE COURT: And what's the page?

MR. WEINBERG: I'm sorry, 427 Fed Second 1957. These are just two of many cases where there is no positive in-court identification and the Jury was allowed to decide the case based on equivocal identifications. In JOHNSON the equivocal identification was "he resembles the photograph" and in court, "he resembles the person I saw."

There was no positive identification. In KELLER, it was similar. Although, there was photo identification which the Court said was patently insufficient to susta a conviction. Here, all we have is Mr. PERKINS with one photographic identification. That photo identification, according to PERKINS, was not a definite one. PERKINS said, "I drew a sketch, - they asked me to look at the people who most resembled the people I saw in the car." He picked out the two pictures which were the closest and he picked out the two that most resembled, that were the closest. He didn't say the pictures were definite. He made a very explicit point of saying he was not sure, that those were the ones that most resembled the persons he saw. How ever he phrased it, when he saw the man in court, he stated forthrightly, "That is not Big Foot."

The cases suggest even if he made a positive photographic identification, when he comes into court and states "it is not him," that it is, that a directed verdict should lie, as the cases of U.S. versus LEVY, 405 F. 2d, 380, which says that if it is a one-eye witness case, and I would also refer the Court in line to U.S. versus TELFARE, 469 F. Second, 552, particularly to footnote 5 on page 555 which says if you have one eye witness that doesn't have a foundation of reliability.

The Court should consider directing a verdict that is even with an in-court identification that is positive. If it is only one witness and the witness isn't shown to be reliable, you know, there are things which a court can say are not reliable and a directed verdict should lie.

Here you have Mr. Perkins who says "I think I remember Big Foot if he was standing in front of me." "No, Robert Marchand isn't the one. He isn't Big Foot." His height and stature is one thing you can't change. Never saw

MARCHAND July 1975. Didn't know whether he had a beard in July 1975. He said he wasn't the man. Didn't remember a beard. Didn't wear glasses. He relied on bulk. We even had Mr. DiVido stand up and he said, "No, Big Foot was bigger than Mr. DiVido or Marchand."

Even if he made an identification which the evidence suggests he did not, on the photographic basis, and although we don't have a transcript of the pre-trial hearing, on 3 different occasions he said it wasn't a positive identification, positive photographic identification. That is the basis of my motion. He said the same thing in court.

Even if PERKINS made a positive photo I.D., down to what happened in court, that is not reliable enough a basis for a jury to find a man guilty.

You have the old law which is, you've got to have evidence which can support a finding beyond a reasonable doubt. There isn't such evidence here. The Jury would have to guess what their basis is. Guesswork, toll records shows mere acquaintanceship. Mr. Roy answered and said those toll records explained what they were. There was never any evidence that Mr Marchand's phone number was that of "Big Foot."

PERKINS on cross-examination said he was merely guessing at the phone number. They have in court the testimony that is explicit, absolute, "This man is not Big Foot." And I know it's hard to search the cases because all the cases of equivocal in-court identification. None of them have both witnesses. These are all the Government's witnesses, cooperating witnesses saying Mr. MARCHAND on an in-court basis. is not Big Foot. I just don't think a jury is entitled to speculate and surmise and guess as to what happened here. They need a foundation and the affirmative evidence.

Your Honor, it is the Government's burden and in this case the Government has failed to sustain its burden. They can't sustain any tentative pre-trial identifications and they haven't sustained it in this case and the Jury, the only way a Jury can find him guilty is by guessing.

Juries sometimes guess, but it is the obligation of the Court to prevent the guessing by exercising its powers and under the Rule 29 to direct a verdict or grant a Judgment of Acquittal. I sincerely ask Your Honor, based on the cases that I have given to Your Honor, particularly the KELLER case, I think this is a much stronger case than ours, for corroboration nor identification, is to grant a Judgment of Acquittal.

THE COURT: Miss Jacobson?

MISS JACOBSON: Your Honor, we feel that in the evidence taken as it must be, in the light most favorable to the Government, at this point, the standard of the Jury that we use to base a directed verdict on, would be if the Jury could not reasonably come to a finding of guilty beyond a reasonable doubt.

We submit that the jury reasonably could, reasonably could make a finding of guilty beyond a reasonable doubt. For that, we rely on the identifications that were made by Mr. PERKINS before the trial, he made one within two weeks after he was arrested. He made another by drawing that sketch a month after he was arrested. Those times were both much closer to the last time he had seen his supplier.

Now, about eight months later he made a photographic identification. He did say his memory was not as good. He was more tentative about it than he had been earlier with the description but selected the picture of ROBERT MARCHAND as most closely resembling the person he knew as "Big Foot" and in addition, in court here, he says his memory again is pretty bad.

At this point we have to remember that he had three opportunities to observe this person "Bob" or "Big Foot". He testified to the first time he met him. He was with him for about 15 minutes. It was at night and in a parking lot outdoors. The next time he saw him at a distance, Big Foot was in a car. He never got close enough to him to talk to him. It was probably 2 or 3 minutes observation as he drove off with Mr. Roy.

The next times was on July 18, 1975 that lasted for approximately 15, 20 minutes, according to Mr. Perkins' testimony. He was extremely nervous at that time because there was a great deal more marijuana being transferred into his car than he expected when he drove down there.

He testified he expected four pounds and ended up with 180 pounds. He was frightened, nervous and testified that things were being done very quickly and he wasn't being too observant. Nevertheless, a week later he gave a good description. A month later he drew a picture. Eight months later he selected a photograph. The photograph and the sketch are remarkably similar. They resemble the person that he saw as "Bob".

Now, we also have to remember that a person can change. He testified that his memory was of someone who was tall and tan, wearing a T-shirt and shorts or casual pants. And, there is nobody in this Court who looks like that today. That is what he said on the stand.

Now, people can lose weight. People can grow beards. People can put glasses on. Things can change in one's appearance. He did say that Mr. MARCHAND resembled Big Foot.

Now, we also have had testimony of Victor ROY and I would take exception to the characterization of him as a cooperating witness for the Government. I think that under the Rule 801(d)(1)(a), the statement that he made to the Grand Jury can be used as affirmative evidence in this trial.

At that time he identified to the Grand Jury that ROBERT MARCHAND was "Bob" or "Big Foot". And because he was impeached at the trial with that testimony and that testimony was given under oath before a GRand Jury, that testimony may be used by this Jury as affirmative evidence of the defendant, MARCHAND's guilt.

Now, both of them did talk about the phone calls as well. Mr. ROY tried to explain them. Nevertheless, those phone calls were centered around a day that he got the marijuana from Mr. MARCHAND. That is circumstantial evidence. It is evidence against him.

The phone calls went to ANN CURTIS' house. Mr. ROY testified that ANN CURTIS was a friend of ROBERT MARCHAND. Mr. PERKINS picked that number out from a list and said that he didn't remember the number now, but he did know it a year and a half ago and when he looked at it he thought that that might be the number.

I submit to you that he was not guessing at the phone number but his recollection was refreshed after seeing it. He had gotten it during the year because he's had no opportunity to call it for a year and a half. But, he looked at it and he picked that out from a list and said "that looks like the number." He didn't pick any other number. That was the number he remembered to call "Big Foot."

Now those toll records show that the number he called is listed to ANN CURTIS. They show that ANN CURTIS and ROBERT MARCHAND both had phones in the same house, 130-A New County Road. It shows that the calls made from RICHARD PERKINS' telephone were made on July 17. Three calls were made on July 18th to that number. Two of those calls from Brattleboro, Vermont where they met Bob, "Big Foot," to pick up the marijuana.

We feel in addition to that, Your Honor, that there are certainly no questions about the fact that the marijuana was transferred, that it in fact, it was marijuana. We feel that there's been evidence to show it was done knowingly, by the admission of prior similar acts by all the people involved, by statements such as "bring back either the money or the marijuana" discussions of price and the phone calls that went back and forth among all parties.

THE COURT: What does the Government claim for 11-A?

MISS JACOBSON: 11-A, Your Honor, has an indication on there of "For Warren, second house from the post office." You will recall Victor ROY testified yesterday that he, in July 1976, when he gave his Grand Jury testimony, that same month, he was living in a house in Warren, Vermont, it was the second house from the post office and we feel that there is a connection to show that Mr. ROY got in touch with Mr. MARCHAND about his Grand Jury testimony and informed him that something was up and we feel that there is a definite connection shown by that piece of paper with Mr. Roy's home address on it, that was found in Mr. Marchand's pockets when Mr. Marchand was arrested for this crime, to connect the two of them up and connect the defendant, ROBERT MARCHAND, to this particular case.

THE COURT: May I see 11-A again, please?

MR. WEINBERG: Directing myself to PERKINS briefly, Mr. PERKINS didn't make an identification two weeks after the event. He merely gave a description that fits five or six million Americans. A big, blond-haired guy. The sketch also would have to be guesswork. The sketch doesn't look enough like Bob to base a description. Both the descriptions fit all kinds of people. All kinds of guesswork, I'm talking about, I think a judgment of acquittal motion should be granted to protect the defendant against all the tentative evidence. "Do you see Big Foot" on three opportunities, only supports a suggestion that as he said, If I saw Big Foot in front of me in Court, I would be able to recognize him. When he said Mr. MARCHAND resembled Big Foot. So, so did two other people.

In terms of Mr. Roy's Grand Jury testimony identifying MARCHAND was all through the photographs, that was excluded, and it only came out in the voir dire. It didn't come out of the trial because Your Honor's pre-trial ruling. All the thing definitely said in that picture is Big Foot. That was all. Not trial evidence. It was all excluded because of the result of the pre-trial photographic identification, so there is no Rule 801 problem, substantive Grand Jury testimony against Mr. MARCHAND.

Finally, so the phone number is this. The U.S. Attorney directed Mr. PERKINS to a phone number and says, "Does that refresh your recollection," showing all the numbers and specific numbers on cross-examination for which there was no rebuttal, I said, "You never made the phone calls, did you?" He said, "No." "You don't remember the number, do you?" "No." Question: "Weren't you guessing when you said that was the number?" Answer: "Yes." that was the last word of Mr. PERKINS. No rebuttal. No more examination from the U.S. Attorney regarding that number being the number of Big Foot.

Consequently, everything that was said was still based on guesswork, identification testimony that is required. No question whether Big Foot was distributing the marijuana knowingly, but from his guess and compelling reasonable doubt as to who was Big Foot. That is the kind of compulsion that really you ought to require and we request Judgment of Acquittal.

MISS JACOGSON: Your Honor, if I may, I would submit all the identification, including the photograph that RICHARD PERKINS selected, must be taken together to see if he made any kind of identification of ROBERT MARCHAND as "Big Foot". In addition to the Grand Jury testimony of Victor ROY he did not talk about the photographs at the trial, but he did say at the trial that he indicated to the Grand Jury that ROBERT MARCHAND was "Big Foot" or "Bob" the person who supplied him.

It was very clear that he led the Grand Jury to believe that ROBERT MARCHAND was the person who supplied him and we submit, Your Honor, that that can be used, those statements of his evidence in the Grand Jury, can be used as affirmative evidence in this trial. We feel it is the Jury's determination of his credibility that must rule. They must determine if he was lying yesterday or if he was lying before the Grand Jury.

MR. WEINBERG: Miss JACOBSON is correct. He indicated that is not the kind of basis that the, for the Jury should find guilt upon. There was no statement to cause an indication he was misleading the Grand Jury. No one, no unequivocal evidence in the Grand Jury room of any kind of reliable details about MARCHAND was the one. As to Mr. PERKINS identification, I suggest in all the photographs, in all the pre-trial, only provides inconsistent statements. If they are admissible at all, they don't go to substantive evidence.

MISS JACOBSON: Your Honor, as a final word, I would say never we cannot get a finding of guilty from the Jury on...(incoherent) ...

THE COURT: The Court will take the matter under consideration. I want to look at the cases cited by the defendant. The Government. I take it other than 801 (d)(1)(a) is the only authority?

MISS JACOBSON: Yes, Your Honor, although we do have, there are some cases that do indicate that certainly evidence of the, of these pre-trial identifications, are admissible at trial even though in-court identification cannot be made positively, they are admissible for use by the Jury for the Jury to judge whether this person can identify the defendant.

THE COURT: Do you have any citations on that?

MISS JACOBSON: Yes, I would cite CHUBBS against the City of New York.

THE COURT: What is the -

MISS JACOBSON: CHUBBS. I could refer Your Honor to page 101 of the Federal Rimes if that would make it easier. Several cases are cited in there.

THE COURT: Anything further?

MISS JACOBSON: No, Your Honor.

MR. WEINBERG: I just recall there has been a change in the way we deal with identification Rule 801(d)(c) requires that there be an indentification of persons after perceiving him which limits it to line-ups and show-ups, not photographs. I would ask Your Honor to consider that when judging whether or not PERKINS' picture is substantive.

THE COURT: The Court will take the matter under consideration. (10:36 a.m.

(RECESSED UNTIL 11:27 A.M.)

WITHOUT PRESENCE OF JURY

THE COURT: The defendant's motion for a directed verdict of acquittal is denied. You may bring in the jury, Mr. Marshal.

(At 11:29 a.m., the jury entered the court room and took their seats).

THE COURT: You may proceed, Mr. Weinberg.

MR. WEINBERG: We would call Tim Hillman.

T-I-M-O-T-H-Y S. H-I-L-L-M-A-N, having been called as a witness by the defendant, was duly sworn by the Clerk and testified on his oath as follows:

DIRECT EXAMINATION BY MR. WEINBERG:

Q. What is your name, sir?

A. Timothy S. Hillman.

Q. What is your address?

A. 7 Lakeview Avenue, Ludenberg, Massachusetts.

Q. Are you an attorney-at-law, sir?

A. Yes, I am.

Q. What is your office address?

A. 341 Main Street is my office address.

Q. You are here in response to a subpoena?

A. Yes, I am.

Q. During - directing your attention to July 15, 1975, sir, did you have occasion to hear that the photograph of your client had been shown to the Grand Jury?

A. Not until July 7, 1975 - July 1976, I did.

Q. Okay, who is that client?

A. My client is ROBERT MARCHAND. He is a civil client of mine.

Q. I show you Government's Exhibit #11-A sir and ask you whether or not you can identify it?

A. Yes, I can.

Q. What is it, sir?

A. It is a, this is some notes that Bob made in my presence, relative to some information I had received.

Q. Tell us the conversation between you and Bob at the time you made those notes?

A. I had gone to Vermont when I had received some information to talk to Victor ROY whom I had been known from high school as an acquaintance. I received information and I went to, - up to Vermont, to determine exactly what I had heard and exactly what Victor had said to anybody, if he had. And, as a result of that meeting with him I had a conversation with Bob which I related to him that I was under the impression that Victor had spoken to some people about an incident involving himself and some marijuana and that during the conversation he had had that Bob had been mentioned and the whole thing involved some sort of a transaction at the University of Massachusetts.

Q. What was Bob's reaction?

A. Bob's reaction was, first of all, he was very surprised. Second of all, I think he was a little bit hurt because he and Victor did know each other and they were acquaintances. I don't think that they were good friends, but they were acquaintances.

MISS JACOBSON: I object to the characterization of Mr. Marchand in response to this. I -

THE COURT: Yes.

Q. What did Bob say after you told him about your reactions to your conversation with Victor ROY July 1976?

A. He said he couldn't believe it. He was hurt.

Q. There is a note, "T-Bird" here. Did you ever tell Bob MARCHAND about a T-Bird?

A. Yes, I did. I believe a T-Bird was mentioned to Mr. ROY. He would not tell me anything about the Grand Jury and I being an attorney, didn't want to ask him. He did mention that he had had a lengthy conversation before going.

MISS JACOBSON: Your Honor, I object to this as hearsay.

THE COURT: We will allow this line of inquiry in explanation of Government's #11-A.

Q. How long have you known Bob MARCHAND?

A. Oh, I think five or six years.

Q. Did you ever know Bob MARCHAND to own a T-Bird?

A. No.

Q. Have you ever known Bob MARCHAND to own any car with New York or New Jersey license plates?

A. No.

Q. Did you ever know Bob MARCHAND to live or in any way be connected with employment in New York or New Jersey?

A. No, I never have.

Q. Pictures of ANN and BOB are on here, did you ever tell Bob MARCHAND in July of 1976 anything about pictures of ANN and Bob?

A. I believe I did. I had received information from my conversation with VICTOR, that previous to testifying before the Grand Jury he had been in a room and that several pictures had been shown of him and possibly of ANN.

Q. You knew Ann to be his fiance?

A. Yes.

Q. And may U. Mass. Bar, did you ever tell Bob MARCHAND anything about that?

A. I was, that was, - I was unsure about that. I was unsure about the whole thing because VICTOR was very evasive and I think even a little embarrassed to see me and the, apparently, the impression that he led me to believe that the whole transaction went down at the U. MASS. Bar but whether or not the transaction went down with BOB or that is what he told him, I don't know, but that was the impression I was led to believe.

Q. And as you said this Bob's statement to you was what, a reply to what you told him about Victor?

A. He was just, "Why me" - "What the heck is this all about?"

MISS JACOBSON: That is not responsive to the question. Move it be stricken.

THE COURT: Yes the motion to strike is granted.

MISS JACOBSON: I'd like to move that be stricken from the record.

THE COURT: Motion to strike is granted.

Q. I will re-phrase it. What did BOB say to you after you told him about these remarks that you had learned from VICTOR?

A. Well, he asked me what I thought he should do. He was, he just said, "Why me?"

Q. Here is "Warren, second house after P.O. MARS" or "MASS HOTEL". What does that refer to?

A. That is the MAR HOTEL that would be, - or was the name of the house that VICTOR was living in. Apparently that was what they called it. That was the directions to get to there and I gave those to Bob because I told him to get himself a darned good criminal lawyer and to get investigators sent up right away, because I believed that he was in trouble.

Q. You can identify Government's Exhibit #11-A as notes?

A. He made these in my presence. I am not even sure it wasnt one of my pads from my office. It was in my office.

Q. By the way sir, have you ever seen during your four or five or six years of knowing Bob MARCHAND, have you ever seen him wearing a beard?

A. Oh yes. On and off. comes and goes.

Q. Okay, what is your present occupation?

A. I am a District Attorney in the State of Massachusetts for Worcester County.

Q. What do district attorneys do in Massachusetts?

A. Well I, - my particular function is, I prosecute felony cases in Worcester Court.

Q. You basically do what Mr. HUGHES and Miss JACOBSON do in the United States District Court here in Vermont?

A. I do it on a State level.

Q. Thank you, sir, no other questions.

CROSS EXAMINATION BY MISS JACOBSON:

Q. Mr. HIllman, you just stated you were a district attorney in Massachusetts?

A. Assistant District Attorney in charge of prosecution.

Q. And I believe you stated a few minutes ago that Mr. MARCHAND was a client of yours?

A. He is a civil client and I advised him on several transactions and he is also a friend of mine.

Q. And do assistant attorneys in Massachusetts have authority to have private clients as well?

A. That is an unusual situation and it's in a state of flux now. Some of the district attorneys do and some don't. I still have my civil practice because I am under an L.E.A.A. grant. It does nothing under their authority. Authority for my funding is from the federal government.

Q. Have you ever seen Bob MARCHAND drive a T-Bird?

A. No.

Q. Have you ever seen him in a T-Bird with someone else?

A. No, I haven't.

Q. Have you ever heard him talk about driving in a T-Bird with someone else?

A. No, I didn't.

Q. Do you know every car that Bob MARCHAND has ever driven in?

A. No, certainly not.

Q. Were you in contact with Robert MARCHAND in July of 1975?

A. July of 1975 I - probably I was. We are in contact quite a bit.

Q. Do you know if he had a beard in July of 1975?

A. I don't know. I really don't know. I don't really pay that much attention to hair suits.

Q. Do you know if he wore glasses in July of 1975?

A. I don't know that either , myself.

Q. When did you talk to Bob, when he made these notes?

A. (No resposne).

Q. Do you remember when that was?

A. Yes I do. It was some time in July, I believe. I received the information shortly after the July Fourth weekend and I went up as soon as I could, which was probably about a week or two weeks after that and then Bob and I had the conversation some time thereafter.

Q. And -

A. I believe it was still in July.

Q. And you drove up to Victor ROY's house in WARREN, VERMONT to talk to him?

A. Yes, I did. Up and down, one night.

Q. And Victor spoke with you about this problem?

A. Reluctantly, yes, but he did speak to me about it.

Q. And didn't Victor tell you that he had identified Mr. MARCHAND as someone who had supplied marijuana, quite a large quantity of it to himself and to someone else?

A. No, he never told me that. He never told me anything about any Grand Jury. He refused to talk about it and I didn't want to ask him about it.

Q. Didn't he tell you that he had told the federal authorities that he had accused his friend of committing a felony?

A. He never told me that. I received that impression from what he had said relative to the interview with Mr.

HANDOGA before he went into the Grand Jury and I was also impressed by the fact that he was very embarrassed about telling me anything about this.

Q. In fact, wasn't he trying to warn you to get in touch with Mr. MARCHAND to tell him that VICTOR had talked to the Federal authorities about this crime?

A. I believe that is, yah, I would say that is a fair assumption.

Q. Thank you. I have no further questions.

MR. WEINBERG: No further questions. Thank you, Mr. Hillman.

A. Thank you.

MR. WEINBERG: Defendant rests, Your Honor.

THE COURT: Defendant rests. (11:40 a.m.) Does the Government have any rebuttal?

MISS JACOBSON: No, we don't , Your Honor.

THE COURT: Plaintiff rests. Evidence is closed. (11:40 a.m.) Will counsel approach the Bench?

AT THE BENCH, OUT OF HEARING BY THE JURY

MR. WEINBERG: We would renew our motions at this time, Your Honor, for Judgment of Acquittal. At the end or at the close of the case, we renew our motion.

THE COURT: The motion will be denied. I am thinking about arguments. Do you wish to commence your final argument today or wait until Monday?

MR. WEINBERG: Are you going to go over to Monday before you charge?

THE COURT: Yes.

MR. WEINBERG: I'd rather wait until you charge wouldn't you?

THE COURT: You would rather argue on Monday?

MISS JACOBSON: On the same day you charge, but if you want to wait until that, -

THECOURT: That is a problem about the weather. Apparently there is a blizzard coming in.

MR. WEINBERG: We can't even get a plane out of Boston. We'd just as soon stay here, Your Honor.

MISS JACOBSON: You can ski home.

THE COURT: Well I think under the circumstances we will recess the trial until Monday morning at 9:30.

MR. WEINBERG: Is there some way we can get in touch with somebody in the event there are any kinds of weather problems in coming back on Monday? I hope, I expect it will be good weather but if the storm is bad or we won't want to keep the Court held up, we'd like somebody to call. May we use Mr. HUGHES as a buffer? I don't anticipate it, but -

THE COURT: It will be a good thing to know if you aren't going to be here.

MR. WEINBERG: Just wish us luck in getting home and hope we make it here on Monday.

THE COURT: The charge conference, we will have it now?

MR. WEINBERG: Sure.

THE COURT: Very well, we will recess but the

-- Court will have the charge conference in Chambers.

MR. WEINBERG: Fine, Your Honor.

THE COURT: Members of the Jury, the Court will recess at this time until Monday morning at 9:30. The evidence is closed, the case is at a very critical point from the standpoint of any participation as far as the submitting the case is concerned. The Court feels that it would be best to submit the case, particularly in view of the weather forecasts that we have, it would be better to submit the case on Monday morning. There remains only the, in this trial, the arguments of counsel, the final arguments of the counsel, the Court's submission of the case to you the Jury for your decision in the matter and verdict.

Again, I want to express the previous cautionary instructions that I have given you each recess that you must not be exposed to any discussion or any statements regarding the case, any news, any communications by way of the news media and you must not discuss the case with any person or listen to any discussion of the case. With these instructions which the Court is confident you will faithfully keep and abide by the Court's directions in every detail, you will be excused until Monday at 9:30. I hope you have a pleasant weekend, although I understand the weather forecast is impending storm, but we will resume the trial Monday at 9:30.

(Adjourned at 11:45 a.m., 7 January 1977)

GOVERNMENT'S REQUESTS TO CHARGE

REQUEST NO. 1. Count 1 of the indictment charges the defendant with distributing and possessing with intent to distribute a certain quantity of a controlled substance, marijuana. Please read Count 1 of the indictment.

REQUEST NO. 2 The charge in Count 1 of this indictment relates to Section 812 and Section 841 of Title 21, United States Code. Section 841 provides in pertinent part as follows:

> It shall be unlawful for any person knowingly or intentinally to distribute or possess with intent to distribute a controlled substance.

Section 812 sets forth the list of controlled substances and places them into various schedules. Section 812 as amended by the Code of Federal Regulations lists marijuana as a Schedule I controlled substance. You may thus consider as a matter of law that marijuana is a controlled substances. You need not be concerned with the significance of the schedule marijuana is placed in since this is not relevant to your deliberations.

The other statute involved in Count 1 is Section 2 of Title 18, United States Code, which reads in pertinent part as follows:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

REQUEST NO. 3.

Before you may find the defendant guilty of Count 1 of the indictment you must be convinced beyond a reasonable doubt that the Government has proven the following elements:

FIRST: That on or about the date mentioned in Count I, a quantity of marijuana was distributed by someone or possessed by someone with the intent to distribute it.

SECOND: That the devendant, whose guilt you are considering, either possessed marijuana with the intent to distribute it or distributed it or that he aided and abetted in the distribution or possession with the intent to distribute by someone else.

THIRD: That the actions of that defendant were done unlawfully, willfully and knowingly.

I now will explain these elements to you. The word "distribute" means the actual, constructive or attempted transfer or delivery of the controlled substance. It is not necessary that the Government prove that someone actually distributed the controlled substance, but rather only that it was possessed with the intent to distribute it.

The word "possess" has its common every day meaning, that is, to have something within your control. To have something in your control does not necessarily mean to have it in your hand or pocket. Control may be demonstrated by the existence of a "working relationship" between the person having such control and the person with actual physical custody.

The word "intent" refers to a person's state of mind. So, the term "possess with intent to distribute" can be fairly stated to mean to control an item with the state of mind or purpose to transfer that item.

You should also note in connection with this first element that under Count 1 of the indictment the defendant is charged with aiding and abetting in the possession of marijuana with the intent to distribute it and the actual distribution of marijuana. I have instructed you as a matter of law that marijuana is a Schedule I controlled substance. However, you are required to find beyond a reasonable doubt that the substance alleged to have been distributed here was marijuana. You may consider in deciding whether the substance was marijuana the testimony of the Government chemist, Gladstone GRiffith.

The second element of Count 1 is that the devendant distributed or possessed with intent to distribute marijuana or aided and abetted in the distribution or possession with the intent to distribute of marijuana. I have read the aiding and abetting statute to you previously and you should understand that under this statute a person who aids and abets another in committing an offense is just as guilty of that offense as if he committed it himself.

To determine whether the defendant aided and abetted in the distribution of a controlled substance, you should ask yourselves these questions: Did he associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his action to make it succeed? If he did, then he is an aider and abettor.

As to the third element, the terms "unlawfully, willfully, and knowingly" mean that you must be satisfied beyond a reasonable doubt that the defendant knew what he was doing and that he did it deliberately and voluntarily as opposed to mistakenly or accidently or as the result of some coercion. Of course, it is not necessary that the defendant knew he was violating any particular law. Rather, it is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general, unlawful nature of his act.

REQUEST NO. 4.

An act is done "knowingly" if done voluntarily and intentionally and not because of mistake, accident, mere negligence or other innocent reason.

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite and intent were present at the time in question. Direct proof is unnecessary, and in fact is usually impossible. Knowledge and intent may be inferred from all the surrounding circumstances.

REQUEST NO. 5.

Now how do you determine the truth and how do you appraise the credibility of the witnesses? Well, you use your own plain, everyday common sense.

You have seen the witnesses, you have observed the manner of their testifying and whatever credit you may give them must be determined by their conduct and their manner of testifying and their relationship or interest in the outcome. In other words, you again apply your common sense and your everyday experience. You may, of course, take into consideration the interest of a witness. An interested witness is not necessarily unworthy of belief. It is a factor, however, which you may consider in determining the weight and credibility to be given to his or her testimony.

If any witness has willfully testified falsely to any material fact, you may disregard all his testimony or accept such part of it as you believe worthy of belief or as it appeals to your reason or judgment.

A witness may be discredited or impeached by contradictory evidence, or by evidence that at other times the witness has made statements inconsistent with the witness' present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

REQUEST NO. 6. ACCOMPLICE'S TESTIMONY

Some of the Government witnesses were admittedly participants in the crime charged in the indictment. The Government frequently must use such testimony because otherwise it would be difficult or impossible to detect or prosecute wrongdoers.

The testimony of an accomplice is not to be rejected unless the jury thinks it has no weight. Like any other fact it is to be taken up and dealt with by the jury - by you who are the triers of the facts. If accomplices could not be used, there are many cases where there is real guilt and where convictions should be had, where convictions would not be obtainable.

Their evidence is properly considered by the jury. Their testimony must, however, be received with caution and weighed with care.

It is universal rule in the federal courts that defendants may be convicted on the uncorroborated testimony of an accomplice.

REQUEST NO. 7.

The law permits but does not require the defendant to testify on his own behalf. Obviously the defendant has a deep personal interest as a result of his prosecution, indeed it is fair to say he has the greatest interest in its outcome.

Interest creates a motive for false testimony and a defendant's interest in the result of his trial is a character possessed by no other witness.

In appraising his credibility, you make take that fact into consideration.

However, I want to say this with equal force. It by no means follows that simply because a person has a vital interest in the end result, that he is not capable of telling a truthful and straight-forward story.

It is for you to decide to what extent, if at all, defendant's interest has affected or colored his testimony.

REQUEST NO. 8.

The Court is requested to take judicial notice of and to publish to the jury, either in the course of his charge or by furnishing the jury with a copy of the following provisions of Title 21 of the United States Code: 21 USC S 812(c) Schedule I(c) (10).

REQUEST NO. 9. STIPULATION

The Government and the defense have agreed upon a stipulation which has been admitted into evidence. The stipulation contains facts which would have been put in evidence by several Government witnesses had they been called to testify at the trial; namely, GLADSTONE GRIFFITH, a chemist of the Drug Enforcement Administration, GEORGE BURTTRAM, an agent of the Drug Enforcement Administration and two representatives of Vermont telephone companies. The facts contained in the stipulation may be considered by you as though these witnesses had in fact testified in court.

REQUEST NO. 10.

The Government respectfully requests that the Court include in its charge to the jury its usual language with respect to the following: "Willfully and knowingly" defined circumstantial evidence, reasonable doubt.

DEFENDANT MARCHAND'S REQUESTS TO CHARGE

1. The indictment is a mere accusation or charge. It is only a form of bringing the defendant to trial. It is not evidence of guilt. The grand jury which presented this indictment never heard the full evidence in this case; nor did the jury hear cross-examination by defendants' counsel, nor arguments by them. You are the first tribunal to hear the entire evidence in this case.

2. Every defendant enters a criminal case with the benefit of the presumption of innocence. That presumption means that he is to be regarded by you as innocent unless he is proven

guilty beyond a reasonable doubt. This presumption is not a mere formaility; every juror is instructed that it should be entertained conscientiously, sincerely and ungrudgingly, unless and until it is overcome by evidence to the exclusion of all reasonable doubt of innocence.

3. The phrase "beyond a reasonable doubt" means that you must be persuaded to a moral certainty that the government has shown the guilt of the defendant. You must be persuaded as you would want to be persuaded about the most important concerns of your lives. Proof beyond a reasonable doubt must be proof of such a convincing character that you would not hesitate to rely and act upon it in the msot important of your own personal affairs. A doubt is not reasonable if it is merely capricious, arbitrary or without any rational basis. If your view of the evidence, or lack of evidence makes you doubt the defendant's guilt because you have not been persuaded that the government has shown the guilt of the defendant beyond a reasonable doubt, then it is your duty to acquit the defendant.

4. You are to follow my instruction only with respect to principles of law.

5. With respect to all facts in this case and to all inferences to be drawn from the facts and to all questions of the credibility of witnesses, you are the judges. There is not a scrap of proof in this case, documentary or otherwise, which you are forced to accept. You can either accept it or reject it, in whole or in part. And once you have accepted a piece of evidence as being the truth, it is up to you to give it that

weight which you think it deserves.

6. In determining whom you will believe and what weight you will give the testimony of the witnesses, you should consider the nature of the evidence given by them, their bias or prejudice, if any has been disclosed, their opportunity to know and to remember the facts about which they testify, their manner and deportment while on the witness stand, their candor or frankness or lack of it, their interest, if any, in the result of this trial, the extent to which they are corroborated or contradicted by other proof, the probabilities as indicated by your common sense and sound judgment that the things asserted in their testimony actually existed or occurred, and such other facts appearing in the evidence as will, in your opinion, aid you in determining the extent to which testimony is worthy of belief.

7. Even if you do not doubt the good faith of a witness, you should look out for circumstances which might lead to inaccurate testimony, such as faulty memory or inadequate perception;

8. During the course of the trial, it often becomes the duty of counsel to make objections, and for the court to rule on them in accordance with what it believes to be the law. You should not consider or be influenced in any way by the fact that such objections have been made;

9. Where oral testimony or an exhibit was limited in a particular way, you are bound by that limitation. You are not to consider any questions or evidence that has been excluded or

stricken. Nor are you to regard any argument of counsel as though it were evidence.

10. If evidence seems to you susceptible of two equally reasonable interpretations, one pointing to innocence and another pointing to guilt, it is your duty to interpret that evidence as indicative of innocence.

11. The mere fact that a witness is employed by the United States Government does not entitle such witness' testimony to more weight or credence than that of any other witness' testimony. You may judge the credibility of all witnesses, including government employees, and consider their interest, if any, in determining the weight to be given to their testimony;

12. In this case, you have heard the testimony of Richard Perkins and Victor Roy, both of whom have pleaded guilty to charges of distributing and conspiracy to distribute marijuana based on their receipt of marijuana from an individual alleged to be the defendant. I charge you, that as a matter of law, both Richard Perkins and Victor Roy were alleged accomplices. Such persons are competent witnesses. However, experience has shown that accomplices may be motivated to place the responsibilities on others than themselves. Accomplice testimony implicating a defendant as a perpetrater of a crime is inherently suspect for such a witness may well have an important personal stake in the outcome of the trial. An accomplice so testifying may believe that the defendant's aquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and

his testimony. Accordingly, I instruct you that the testimony of such witnesses should be received by you with suspicion and scrutinized with the very greatest care and caution.

The testimony of Perkins and Roy ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. The jury is cautioned against placing too much reliance upon the testimony of an alleged accomplice, and the jury may well, if it chooses, require corraborating testimony before giving any credence whatever to an alleged accomplice. You should never convict a defendant on the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt. Crawford v. United States, 212 U.S. 183, 204 (1909); Caminetti v. United States, 242 U. S. 470, 495 (1919); Freed v. United States, 49 App. D. C. 392, 266 Fed. 1012 (1920); Devitt and Blackmar Section 12.04; United States v. Owens, 460 F. 2d 268 (10th Cir. 1972); United States v. Santana, 503 F. 2d 710 (2nd Cir. 1974); United States v. Gonzalez, 488 F.2d 1282: and United States v. Projansky, 465 F. 2d 123 (2nd Cir. 1972); United States v. Swiderski, 539 F. 2d 854, 860 (2nd Cir. 1976).

13. Victor Roy, has testified here pursuant to a grant of immunity. Such persons are competent witnesses, however, I instruct you that the testimony of an individual who has been granted immunity from punishment must be closely scrutinized and examined and weighed by the jury with greater care than the testimony of an ordinary witness. You must determine whether the immunized witness' testimony has been affected by interest

or by prejudice against the defendant. You should scrutinize the testimony of an immunized witness like Roy closely to determine whether it is slanted in such a way as to place guilt upon the defendant in order to further the witness' own interest.

You should receive such testimony with suspicion and act upon such testimony with caution. United States v. Leonard, 494, F.2d 955 (D.C. Cir. 1974); United States v. Demopoules, 506 F. 2d 1171, 1170 (7th Cir. 1974); cert. den. 95 Ct. 1427;

14. The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony of that witness or give it such credibility as you may think it deserves;

15. The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness; it is the province of the jury to determine the weight to be given to any prior conviction as impeachment;

16. You are instructed that the defendant's position is that he was not involved in the commission of the offense with which he has been charged. It is his position that the Govern-

ment witnesses must have falsely testified against him for reasons of their own, such as obtaining benefits from the Government in relation to charges filed against them, or maintaining benefits already provided. United States v. Alfonso-Perez, 535 F. 2d 1362 (2nd Cir. 1976);

17. One of the most important issues in this case is the identification of the defendant by Mr. Roy and Mr. Perkins as the perpetrator of the offense charged. The Government has the burden of proving identity beyond a reasonable doubt, for the burden of proof on the prosecutor extends to every element of the crime charge, and this specifically included the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with shich he has been charged. I instruct you that eyewitness identification is "notably fallible" (United States v. Hodges, 515 F. 2d 650, 653, 7th Cir. 1975) and that testimony tending to prove identity is to be scrutinized with extreme care (United States v. Hodges, 515 F. 2d 650, 651 (7th Cir. 1975)). You, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identifications of the defendant before you may convict him; if you are not convinced beyond a reasonable doubt that the defendant committed the offense charged, you must find the defendant not guilty. United States v. Telfaire, 469 F. 2d 552, 558 (D.C. Cir. 1972); United States v. Holley, 502 F. 2d 273 (4th Cir. 1974); United States v. Gentile, 530 F. 2d 461, 469 (2nd Cir. 1976); cert. den. 96 S. Ct. 2651; United States v. Dodge, 538 F. 2d 770, 783-784, (8th Cir. 1976);

18. Prior to trial, Richard Perkins was shown a series of photographs from which he made a tentative identification of the defendant. I instruct you that because of the notable fallibility of eyewitness identification procedures misidentification can occur even if the police follow the most correct photographic identification procedures.

Furthermore, once such a misidentification is made the witness thereafter is apt to retain in his memory the image of the photograph rather than that of the person actually seen, reducing the trustworthiness of subsequent court room identification.

Simmons v. United States, 390 U.S. 377, 383-384 (1968); United States v. Fernandez, 456 F. 2d 638, 643-644 (2nd Cir. 1972);

19. If in any part of the case you run across conclusions of fact which point equally to guilt or innocence, then you must reject the conclusion pointing to guilt;

20. The defendant is presumed to be innocent and you may not, as a matter of law, find him guilty of any crime, unless you are satisfied beyond a reasonable doubt that the government has proven each and every essential element of the charges set forth in the indictment;

21. While the jury is permitted to draw rational inferences from evidence, no essential element of the crime may rest on mere speculation, surmise, conjecture or guess. They must be proved beyond a reasonable doubt;

22. The defendant has pleaded not guilty. Under our system of law, he is presumed innocent and has no obligation to

disprove the charges alleged in the indictment not to affirmatively prove his innocence. He is not required to produce any witnesses in order to establish his innocence, but rather has an absolute right to insist that the government, which has charged him with an offense, prove that he is guilty of that offense beyond a reasonable doubt;

23. As a matter of Law in accordance with our system of justice, a defendant has a constitutional right not to testify and the jury has a solemn obligation to respect it and draw no negative inference from it. His failure to testify must in no way be considered by you in arriving at a verdict;

24. If a defendant takes advantage of his fundamental constitutional right to not to testify, you are in no way to consider his failure to do so as the slightest evidence of his guilt or innocence;

25. There may be many reasons consistent with innocence which might be the basis for a defendant not taking the witness stand.

DEFENDANT'S SUPPLEMENTAL REQUESTS TO CHARGE:

26. Any and all testimony by Agent Handoga about the photographic identification by Richard Perkins is only admissible to impeach Mr. Perkins and may not be considered as evidence of the guilt or innocence of the defendant.

27. Any and all testimony by Richard Perkins about pretrial procedures is only admissible to impeach his in-court failure to identify the defendant and may not be considered as evidence of the guilt or innocence of the defendant.

FOURTH DAY 12 January 1977
9:35 a.m.

IN CHAMBERS

THE COURT: Do you wish to have the defendant here?

MR. WEINBERG: No.

THE COURT: I indicated at our conference last Friday before the snow storm that I would advise you about your supplemental requests for instructions, the defendant's supplemental request for instructions 26 and 27 I will deny those requests and I also would like it to appear that the, on the record, that it was my understanding that the Government doesn't wish to stand on the aiding and abetting part of it under Title 18, Section 2 and the Court has eliminated that. That is about it.

MISS JACOBSON: That's right, Your Honor.

MR. WEINBERG: I also waive instruction #13 regarding immunity, the instructions will exclude that?

THE COURT: I think I did refer to it in the instructions because, or the cautionary instructions regarding accomplice applies to a witness who has been granted immunity.

MR. WEINBERG: Your Honor, just, I would like to take this opportunity to renew the motion for, motion of judgment of acquittal, one additional ground. The Government is relying on 801 the idea that the grand jury testimony of ROY could be used substantively not only in review. Seems only statements made under oath in prior proceedings could be used substantively. The main question to ROY is, "did you try to mislead the Grand Jury?" Marchand was the one. Both, we move for judgment of aquittal if the denial was based on that being substantive evidence because I don't think that is a statement. It's kind of a statement and opinion.

Conclusion of the Grand Jury will exclude it as from another of the pre-trial photographic identification procedure and, of course, we would also, along those lines, object to any instructions to the jury and along them to use what his prior impression were, substantively.

THE COURT: Well, the Court will deny the motion and I will instruct that they may use prior identification as evidence.

MISS JACOBSON: Thank you, Your Honor.

MR. WEINBERG: Just particularly the Roy's prior, the Grand Jury testimony of ROY made did not, was not discussed, you know, as statements per se because specific statements taken so instead, MISS JACOBSON, I thought, very, in general, you could ask him, "did you try to mislead the Grand Jury?" "Robert Marchand was the one"-I don't think would fall under the 801 provisions.

THE COURT: Well, I will instruct them on it.

MR. OTERI: For the purpose of argument, you weren't in any way going to comment on the photos of ROY's testimony, are you?

MISS JACOBSON: No.

MR. OTERI: I don't want to get into the kind of situation where we have to object.

MISS JACOBSON: That's never come in.

MR. OTERI: I don't know whether you were going to bend the law a little.

MISS JACOBSON: Not there. Judge Holden, I have one question. I am not sure it was clear if the defendant's request, number 10, is going to be included in your charge. I was wondering if you could tell me that?

THE COURT: Well, yes.

MISS JACOBSON: Because I was reading a few cases and it is my impression that is not the law in the Second Circuit.

THE COURT: I will charge it with some modification.

MISS JACOBSON: All right. The latest case that I found, United States vs. Carneglia, 1975, indicates that a jury may convict on an inference regardless of any explanation offered by the defendants, whether it comes through cross-examination or whether they offer any testimony of innocence so that even if there is a inference of innocence if the jury interprets that innocence as guilt, they certainly can convict on that inference. That was the Cert. which was denied in the Supreme Court. I think that is the law as it stands.

United States vs. Carneglia, 468 F. 2d 1084 (2nd Cir. 1972) Cert. denied, 410 U.S. 945, 1973.

Certainly a jury may be told that it is not required to accept any inferences that are presented by either side, but if they choose to use that inference and interprets it as indicating guilt, I think they are entitled to do that.

MR. WEINBERG: We point out, any reasonable interpretation of innocence constitutes a reasonable doubt and instructions for;--request for instruction ten is kind of a traditional instruction which has been up-held and approved by all kinds of courts.

MISS JACOBSON: Not in the Second Circuit. I think reasonable doubt instructions certainly have been given and cover that. I would object very strongly to this particular wording but Your Honor has indicated that you are going to modify it some.

MR. WEINBERG: The CARNEGLIA case explicitly denies the instructions.

MISS JACOBSON: No, not in so many words. It does state that there was an interpretation offered by the defendant and it was a reasonable interpretation of guilt. It was reasonable, therefore, that they could convict on that inference.

THE COURT: I will take a look at it.

(IN COURT: 9:50 a.m. MORNING SESSION:) JURY PRESENT

THE COURT: The Government may proceed to argument.

MISS JACOBSON: May it please the Court, Counsel, Ladies and Gentlemen of the Jury. First of all, I would like to apologize on behalf of JOHN HUGHES He sat here last week and right now he had to go to Burlington and with all the delays, he was unable to sit here and he apologizes for not being able to sit here.

Now, it has been a few days since we have been together but as you know, the factual testimony is all in and it is time now for counsel for the Government, and for the defense, to review with you the evidence that has been presented and help you digest it and try to digest it.

Now, please remember that no matter what I say or what the Defense counsel is about to tell you, it is your memory about the facts of the evidence that came in that rules. What you remember is what counts.

Now, when we began, I told you what the defendant, Robert Marchand, was charged with. Now, to prove those charges, the Government had to show that marijuana was distributed or possessed with the intent to distribute by the defendant and it was done knowingly and intentionally.

Now, there is really no question that something was distributed. That was 180 pounds of marijuana, distributed on or about July 18, 1975. You heard the testimony of Agent Handoga who acted as a surveillance agent in South Burlington, Vermont when RICHARD PERKINS AND VICTOR ROY were arrested with 180 pounds of substance in their car.

You heard through the stipulation that I read to you that was signed by all counsel, that Special Agent GEORGE BURTTRAM of the Drug Enforcement Agency was involved in that arrest of RICHARD PERKINS and VICTOR ROY when they attempted to distribute something you heard RICHARD PERKINS talking about getting this marijuana in Brattleboro, Vermont. You heard VICTOR ROY talk about getting the marijuana and his trying to distribute it.

You have these pictures. These are Government's Exhibits, #2 through #6. These pictures are pictures of the substance that was found in PERKINS and ROY's car that they attempted to distribute and it shows the large quantities that they were trying to get rid of.

There is no question, either that the substance was in fact, marijuana. You will recall this stipulation. This is something, as I said, which was signed by all counsel. By me for the Government, and by the counsel for the defense and by the defendant. In here, there is testimony or the equivalent of testimony by the chemist for the Drug Administration and in this, he says that he received the substance from Agent Handoga and Agent Burttrum, which the chemist analyzed and in fact it was marijuana.

The judge will tell you that the stipulation may be considered by you as though this person had testified on the stand before you.

Now, as we review all the evidence and everything that came in, you will see as well, that there is little doubt, very little question that the defendant here is the person who distributed that marijuana to PERKINS AND ROY in Brattleboro, Vermont.

First, let us consider RICHARD PERKINS's testimony. He described to you the transaction that took place on July 18,

1975. He began with the telephone calls to a number that he pointed out on toll records from his phone. He talked about the trip to Brattleboro; he talked about waiting around in Brattleboro for the supplier to show up. The supplier did show up. They went off to a dirt road and the marijuana was transferred from one car into the car that PERKINS and ROY were driving

It ended up with RICHARD PERKINS and VICTOR ROY taking that marijuana up to Burlington to distribute and they were subsequently arrested. Well, RICHARD was scared when he was arrested and so, he decided, as he said on the stand, that he would cooperate with the Government and he would tell us the truth about what happened.

Now, as he told you, one week after he was arrested, he talked with Agent HANDOGA and he gave him a description of the man who supplied him with 180 pounds of marijuana. That description included his hair, his height, his size, approximate weight, his approximate age, and also it left out the presence of a beard, left out any mention of glasses.

A month after the arrest, again Richard Perkins talked with Agent Handoga. He told him that he had drawn a sketch. He drew a picture of the supplier, this man he knew as "Big Foot," or Bob. Even then he said his memory was starting to fade but he tried to do his best. He sat there and he tried to remember what this person looked like. This is what he came up with; Government's Exhibit #7. It's a picture that he drew and he labeled it at the bottom, "Big Foot."

Look at this sketch carefully. Look at the style of hair. Look at the features and look at the fact that there is no beard and no glasses. This is the way that Richard Perkins remembered his supplier. That is what he looked like when Richard Perkins saw him on July 18th, 1975.

Remember Richard Perkins testified that he only saw the defendant three times. He met him once when he was with Victor Roy, it was at night, they drove down to some parking lot, Howard Johnson's, he thinks around Springfield, Vermont. They talked for maybe 15 minutes in a darkened parking lot. That was the first time. The second time was even shorter and it was from a distance. Remember, he talked about two earlier business transactions before the 18th of marijuana. The second time he said he saw "Big Foot" was in a car, for about a minute at a distance.

The third time was on the 18th. Now, that lasted about 15 minutes to 20 minutes, but Richard testified too, that he was very nervous that day because he was getting 180 pounds of marijuana thrown into his car. He had expected four pounds. 180 pounds is quite a difference and he said he was very nervous, he didn't know what was happening. He was waiting for the police to come around the corner. That was the third time and the last time he saw him.

Remember that in April of 1976, about eight or nine months after July 18, Richard Perkins looked at the whole set of pictures in Agent Handoga's office. He was trying to select a picture at that time that looked like Bob, that looked like

"Big Foot"; that looked like the guy who gave him all that marijuana, and what did he come up with? This is what he came up with. Government's Exhibit #19--that is a picture of ROBERT MARCHAND. That is the picture that Richard Perkins showed that most looks like the guy who gave him the marijuana.

Now look at this picture. Look at the hair style. Do you see a beard? Do you see glasses? That is ROBERT MARCHAND and that is the picture that Richard Perkins chose as his supplier. Look at that sketch again. Look at the photograph again when you are in the jury room. Remember the description that Richard gave a week after he was arrested.

All of those were made much closer in time to when Richard was arrested and to the last time that he saw Bob. Recall that Richard's memory was of somebody who was tan and tall, tan from the summer sun. Probably a little blonder from the summer sun. He was wearing a tee shirt and shorts and he looked big.

Now, there is nobody in court who fits that description. It is not summer any more. Nobody is tan any more. Remember that Richard is not a trained observer. He is not a policeman; he is not an agent; he is just an ordinary kid who was nervous and who got into a lot of trouble and who is trying to tell the truth now.

Consider how a person can be changed. If you change your clothes from a tee-shirt and shorts to a dark suit, if you grow a beard, if you put on tinted glasses, maybe even if you lost a little weight. I'm sure that some of you have had some

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experience with, say, a neighbor's son or a cousin, one who went away to school, who joined the army, someone that you haven't seen for a year or two. Then, he comes home and his hair is longer or shorter; put on a little weight or lost a little weight; suddenly, he looks very different. It's hard to recognize him. Those things happen.

Consider this. Why does ROBERT MARCHAND have a beard now? He didn't have one at the day he was arrested. You heard Agent Harris say that he was the man who arrested Robert Marchand and he said that Robert Marchand did not have a beard to the best of his memory. He said Robert Marchand was not wearing glasses, to the best of his memory. Consider these things and consider when those earlier identifications were made by Richard Perkins. Consider when he made that description--a week after his arrest.

When did he draw that sketch? A month after his arrest. When did he choose that photograph? About eight months after his arrest. How many months have gone by now? A year and a half.

Consider Victor Roy's testimony and remember that a very important part of your job is to decide if a witness is telling the truth. You are a judge of the witness' credibility. You are the ones who must decide if these people are telling the truth when they are on the stand. You have to decide if he was telling the truth in court here to you when he said he lied to the Grand Jury or if he was telling the truth to the Grand Jury and he was lying to you.

Consider how he looked when he was on the stand. Consider his demeanor. Do you remember when he hesitated? He would be asked questions and then he would say, "wait a minute, run through that again, okay?" Well, do you think it's because he didn't understand the questions or because he was trying to give himself a little more time to come up with an answer?

He told you about that marijuana deal, too. He told you about the 180 pounds and he told you about going to Brattleboro and he said pretty much the same thing that Richard Perkins had said, except now, he says that Bob Marchand is not the Bob who supplied him with the marijuana, even though he gave sworn testimony, under oath, to a Grand Jury that identified Bob Marchand as "Big Foot" or Bob, the supplier.

Now, Roy claims he was lying then when he identified his friend as the person who supplied him with marijuana as the person who committed a felony. Why? Because he didn't think that anything would happen. He said he didn't think that it would come to anything. Well, look at it both ways. Assume he lied to the Grand Jury. What does that mean? That means he told the Grand Jury that his friend, a friend of his for four years, met him in 1972 or somewhere around there. He told the Grand Jury that this friend, committed a felony; that this friend gave him 180 pounds of marijuana.

He didn't just pick out somebody, some aquaintance, or somebody he didn't know very well. He picked a friend and he told the Grand Jury that his friend committed a crime. And, after he told that to the Grand Jury, if that was a lie, you would think that he would call his friend up and give him some warning, but did he? No.

He says, "No, I didn't call him up. I didn't tell him anything." Neither did he come to the Unites States Attorney's office or the Drug Enforcement Administration office and say, "Hey, you know, I was scared and I said something that is not the truth and I've got to correct it." No, he never did that.

Now, he didn't have to wait for a trial to tell the truth. He could have come to the office any time. He could have gone to Agent Handoga at the Drug Enforcement Administration any time, but he never did. Does that sound like a friend?

Now, assume that he told the truth to the Grand Jury, that Bob Marchand was "Big Foot." Now that is his friend, that is somebody he knows. It makes a little more sense that he won't call his friend up then and tell him that he was going to be in big trouble because he spilled the beans. He told the Grand Jury what Bob had done.

Now, that sits a little better. Then, he gets immunity. Now his friend Bob knows that he testified in the Grand Jury, so now, Victor has immunity and he can't be prosecuted for anything else. So what does he do? He sits here and now he says, "Oh no, he's not the one--that's not him. I lied then, but now I'm telling the truth."

He is trying to help out his friend now. He is trying to get him out of trouble now. Some friend!

Now, you know the Government didn't really get to choose our witnesses. Very often we are stuck with them and we have to call the people who were involved. So, as a representative of the Government, I can not vouch for Victor Roy's credibility. I don't claim that he is telling the truth all the time. Now it is up to you to decide when he told the truth.

As the Judge will tell you, you can accept all of his testimony. You can accept any part of it that you believe.

While Victor was on the stand, he also mentioned a girl named Anne--Somebody he had seen with Bob, with "Big Foot." And you heard that Anne is Robert Marchand's girl friend. Anne lives in the same house as Marchand and that it was Anne's telephone number that Roy and Perkins used when they wanted to call Bob, their supplier.

Now, Roy said he saw her with "Big Foot" and he saw her with Marchand. Same Anne. Well, you know he can try to change his testimony about who "Big Foot" is and who Bob is, but there wasn't much he could do with Anne. She is there and there is nothing much you can do about her phone number. That is there, too and that was the number that was used to get "Big Foot."

Consider these telephone numbers record that are in evidence--Government's Exhibit #8. These records of a phone listed to Richard Perkins and Victor Roy when living in July of 1975. Now, Perkins pointed out a number that he recognized as the one they used to get "Big Foot." That is the second one from the top. 802-622-8206. That number appears in some interesting places on these records. It appears in June, on the ninth and then it appears later in June on the 13th.

Now, you remember both Richard Perkins and Victor Roy testified about two smaller deals they had with Bob before the 18th. Those deals are not part of your consideration. They are only to be used as far as they show that these men had dealt with each other before and they intended to do it again, on the 18th. It was no accident that they were together on the 18th.

There are those two calls in June about a week apart and then around the 18th of July there is a whole flurry of calls. There is one on July 17th and then on the 18th. There are three of them. There is one that was made at home from Richard Perkins phone number and then there are two that were made from a phone in Brattleboro, Vermont.

Now, you heard Richard Perkins and you heard Victor Roy testify that when they went down to Brattleboro, they were going to meet their supplier, but they had to wait for a while. He didn't show up right away. So what did they do while they were waiting? They called him twice to see where he was. When he was there, they wanted to get it over with and go home.

Now, you look at these records and you can see those phone calls and you can also see that after July 18, there are no more calls to that number. The deals were over. Richard Perkins and Victor Roy were arrested and that was the end of it. And they didn't call that number any more. That number was their supplier. That is the number they called to get the marijuana and after the 18th, they never called it again because they never had any more deals with Robert Marchand.

These are more telephone records. Government's Exhibit #9-A through "D". These are records of telephone listing to Robert Marchand and to Anne Curtis. The purpose of these records are to show you that they are both located in the same house. The number that is listed to Anne Curtis, 622-8206 shows up on these records, Government's Exhibit #9-"A" and 9-"B" as being listed in the same house as another phone that was listed to Robert Marchand.

So, when Victor Roy and Richard Perkins called Anne Curtis number, they were calling Bob Marchand's house and they were calling for marijuana.

They were calling the same Anne that Victor Roy met with Bob. The same Anne as Robert Marchand's girl friend.

Now, in addition to those, you can consider all these other incidents. Look at this piece of paper, too. Government's Exhibit 11-A. This is the paper that has none other than Victor Roy's address and things that Victor told the Government.about that deal on the 18th.

That piece of paper was in Robert Marchand's pocket when he was arrested. That shows that there was some concern about what Victor Roy had said to the Government. Now, when you look at that and you look at the phone records, you look at the sketch and look at the photograph, consider all these things.

Ladies and Gentlemen, we submit to you that you can only find Robert Marchand guilty as he is charged. Thank you very

AT THE BENCH

MR. WEINBERG: Your Honor, the defendant would move for mis-trial based upon the Government's final argument. In general and in particular to those statements that VICTOR ROY identified ROBERT MARCHAND at the Grand Jury as, "Big Foot." That was not the evidence at the trial. ROY said that he mis-lead the Grand Jury in that direction. That there was no affirmative evidence from ROY as there couldn't be because it would have been tainted by the photographic identification which Your Honor excluded.

ROY identified ROBERT MARCHAND as "Big Foot" in the Grand Jury. The Government has asked the jury to speculate whether to use the Grand Jury testimony or the in-court testimony of ROY as substantive evidence of the guilt or innocence. I think on the basis of the record that it is not statements within Rule 801--can't be used substantively. The Government's final argument was in that direction. The thrust of it was and we, therefore, move for a mis-trial.

THE COURT: The motion will be denied, proceed to the argument.

DEFENDANT'S ARGUING STATEMENTS

MR. OTERI: Mr. Forman, ladies and gentlemen of the jury, first I would like to apologize for keeping you waiting for two days but I guess you understand that the weather was bad and we couldn't get here and secondly, before I get into my actual presentation, I repeat what the prosecutor said. Anything I say or anything she said is not evidence.

DEFENDANT'S ARGUING STATEMENTS

The evidence is what you remember from the witness stand. After hearing the prosecutor describe the testimony of MR. ROY and MR. PERKINS, I wonder if perhaps we heard the same evidence of if perhaps we were in the same trial.

I will get to that in just a moment. Before getting to it, I would like to point out that His Honor will explain to you what the law is which you must apply to this case. There are basic points of law which I would like to touch on briefly because there are going to be woven throughout the course of my discussion with you.

MISS JACOBSON: Excuse me. I object to counsel discussing the law.

THE COURT: Well,....

MR. OTERI: May I not talk about burden of proof and reasonable doubt, Your Honor?

THE COURT: Yes. The Court will allow counsel to explain the facts as they apply. We have had charge conference which indicates the Court's instructions on these various points. As long as the Counsel's arguments are consistent with the charge conference, we will allow him to proceed.

MR. OTERI: Thank you, Your Honor. I have just two basic points that I have to talk to you about for a minute. His Honor will explain, in detail, the law with regard to this trial.

In this country, unlike any other or many other countries, the burden of proof of guilt beyond a reasonable doubt rests upon the Government. A person accused of a crime in this country has no burden to come before a court and present one bit of evidence that he is innocent.

The Government must prove by the greater weight of the evidence of his guilt beyond a reasonable doubt. Now, His Honor is going to tell you what reasonable doubt is. Basically, it is a degree of moral certainty. We cannot give you a definite scale of one to a thousand, but it is 87 percent or 93 percent. It is considerably more than those of you who have sat on a civil jury where you have been told that the preponderance of the evidence might be 51 percent. It is considerably more than that. It is to a moral certainty.

All twelve of you must be convinced to a moral certainty by the evidence presented by the Government that the defendant is guilty beyond a reasonable doubt.

The defendant has absolutely no requirement of the burden to take the witness stand, to testify, to present any evidence, and that is what makes this country great.

The fact that they can't force you to get up there and be cross-examined. They can't force you to take on the burden of defending yourself. They have to prove your guilt.

In this case, as in all cases involving defense counsel, we are like doctors. We make the diagnoses. We make the decisions for the course of treatment. If you don't like it, you can go to someone else. I decide whether my client puts on a defense or takes the witness stand and I say to you that when we go over this evidence, you will see why it's impossible for the defendant to take the stand in a case like this or put on any evidence and let's look at the evidence.

Let us first look at the phone records. The prosecutor tells you that MR. PERKINS, that fine young man, said to you he picked out the telephone number on the 18th of July; that he called and that it was ANNE CURTIS's number.

Remember, ladies and gentlemen, the prosecutor got up from where she was examining and went around there, came over to here and handed him an exhibit which you have, which was the toll records, to MR. PERKINS and she was standing right here facing this way and she said to him, "I direct your attention to the second phone number on that page." He looked at it and then she said to him, "Is this the number you called, are you familiar with this number?" And he said, "It looks familiar," she said, "Is this the number you called to get Mr. MARCHAND or 'Big Foot'?"

She was trying to get "Big Foot" and MR. MARCHAND put together. She said Bob and then "Big Foot" and then MR. MARCHAND or the defendant--"Is this the number?" He said, "I don't know, it looks familiar." "It looks familiar." Not, "it's the number, not Mr. MARCHAND's number, not, "it's 'Big Foot's' number."

We have an interweaving here. The Government, very skillfully, uses the name, "Bob", one time used the word, "Big Foot" and another time they used the word, "defendant." They have woven them together to confuse or form a patent to to make you, as jurors, think that they are all one and the same person.

You must separate in your own minds because it is your duty to decide whether or not a man is guilty. It is up to you to decide whether or not a man leaves this courtroom or not. It is a horrible burden which you must meet. You must meet it fairly, based upon the evidence and not upon surmise, conjecture, or guess-work.

Now, I ask you to think about little things, before we get into the heart of the testimony. Think about the "T-Bird" that had been driven by "Big Foot." There is no evidence whatsoever showing that the license or registration connects to the defendant, MARCHAND. There is no evidence which shows MARCHAND ever having a "T-Bird." There was evidence that he didn't have one from Mr. HILLMAN, the District Attorney who testified for him.

The Government makes a thing in its argument about the fact that "Big Foot" didn't have a beard or glasses. Remember, ladies and gentlemen, "Big Foot" didn't have a beard or glasses, so what? The Government has the burden of proving to you that the defendant, MARCHAND, who the Government accuses of being "Big Foot" didn't have a beard or glasses in 1975 or July 18th. That is their burden. They must show you BOB MARCHAND, who they accuse of being "Big Foot" didn't have a beard or glasses, you can't guess.

You can't sit there in the jury room and say, "Well, he didn't have a beard and glasses." There is no evidence that he didn't. There is evidence from MR. HILLMAN that he has had a beard on and off over the course of the years. The defendant very likely couldn't tell you whether or not he had a beard and glasses then. Who can remember? I can't remember when I first grew mine. I can give you an approximation. I don't imagine that any juror can remember when he grew his hair long or when he grew his moustache--he may have an idea, but not specific dates.

Remember something else. The prosecutor told you that MR. HARRIS, the detective who arrested the defendant, testified that he was clean shaven. That is not true. MR. HARRIS was never asked that question and he never answered it. I'm sure the Government intended to ask it, but very likely forgot. Even if they did, remember this. What is the best evidence? They could have brought in a mug-shot. When they arrest you, they take your picture. Bring in his picture and show it to you. Let you compare a picture of him clean shaven, if in fact he was, with the drawings you saw. Then you would have something to go by.

They don't do it. Why don't they do it? Because it would very likely not match. Now, let's get into MR. PERKINS's testimony.

Oh, by the way, we entered into some stipulation. Just so that you will understand, a stipulation is nothing but certain facts in a case which we waste a great deal of time proving, if they are not in fact harmful to the defendant, he generally agrees to stipulate them.

This case is what we call a one issue case. We don't deny that marijuana was delivered to PERKINS; we don't deny that ROY and PERKINS sold it to undercover agents; we don't deny that it was marijuana; we don't deny any of that. There is one issue in this case. My client denies that he delivered it to them. That is what you are really going to have to decide. Did my client, MR. MARCHAND, the person that delivered the particular substance, the marijuana, to these two men? Did the Government prove it to you beyond a reasonable doubt?

Now, the Government tells you that on the day of this transfer of marijuana that the fellow involved had on a "Tee-shirt, shorts, and was tan." She makes the point that he is dressed differently. Well, I don't think that even the Government would ask him to come in, in a "Tee"-shirt and shorts today, but the fact is that the Government had every way in the world they could prove it. They had witnesses on the witness stand that could tell you whether or not it was him.

They tell you that you can change your hair. Well, you can't change the size of the structure of your body. You can lose weight but you can't change the structure of your body and you heard MR. PERKINS, who is a Government witness--the Government called him--say right in this court room, "There are three people who look like 'Big Foot'."

He picked out the big fellow, DiVido, he picked out my client and he picked out the attorney, MR. WHITE, the local attorney who is helping us. And then he said when DiVido stood up, who is huge, he said, "Big Foot was bigger than him." Well, I say to you, if your bigger than that kid, DiVido, who has muscles rippling and bulging all over, you can lose weight but you don't get rid of those big muscles.

Remember something else. He said,--PERKINS said he drew a picture. That was not a very good picture that was drawn a month after the incident and then, nine or ten months later, he picked out a picture that looked like the defendant, that resembled "Big Foot" in fact was a picture of the defendant.

Remember this, when you look at the spreads, look at the picture that put in there of MR. MARCHAND. Everybody has little, small mug-shot pictures. The defendant, who has no record, has no mug-shot. He has a great, big, high school graduation picture which immediately focuses attention upon him. I don't dispute, at all, that the defendant may well have looked like this man, "Big Foot." He very well might have, which is probably why he is here.

Remember that PERKINS told you in this court room from that witness stand--he said, "I think I would be able to identify "Big Foot' if I saw him here today." When MR. MARCHAND stood up, we asked him, "Is that the man?" he said, "No, it is not."

Now, this is the Government's witness. They have the burden of convincing you beyond a reasonable doubt that MARCHAND is "Big Foot" and their first witness says flat out, "No he is not." Now, think about his testimony. Does he have any motive to help the defendant? He doesn't know the defendant. There is no motive for him to lie. He is not granted any kind of immunity. He is there and he tells you that it is not the defendant.

Now, he also told you that on the 18th of July, the defendant,--strike that. Concerning the telephone numbers which were shown to you, the prosecutor asked him, "Did you make any calls when you were in Brattleboro?" and he said, "Yes." The prosecutor never asked him, "Who did you call?" They just asked, "Did you make calls?" Later, although the Government makes a big thing about it now, the Government puts VICTOR ROY on the stand and we get from him the fact that ROY was making calls, trying to sell the marijuana he was getting and he made calls to that particular number, MR. MARCHAND's number, to try and sell him grass and MARCHAND didn't buy it.

That connected calls from Brattleboro to MARCHAND to sell the grass, according to the Government's witness. Back to MR. PERKINS, PERKINS told you on the Government's questioning that "Big Foot" called PERKINS on the 18th at PERKINS's home. He called him.

When you look at those toll records, look at MR. MARCHAND's toll record. One of you jurors is an engineer. Look at those toll records, draw on your experience. If a person called from point "A" to point "B" and it is a long distance call, it is going to be on the toll record. You won't find any record from MR. MARCHAND's house of a call to MR. PERKINS because he didn't call him that day, even though PERKINS said "Big Foot" called him that day about a deal going down. Nobody tells you

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about that.

Now, going into MR. ROY's testimony, the Government called MR. ROY as a witness. The Government doesn't necessarily vouch for him, but the Government put him on the stand. The Government says to you, "Well, MR. ROY could have come to us at any time."--that he was lying about identifying MR. MARCHAND. I say to you, ladies and gentlemen, VICTOR ROY never told you or told the Grand Jury that ROBERT MARCHAND was "Big Foot." He never told them that.

He said in answer to the Government's cross-examination or direct examination, "I tried to mis-lead the Grand Jury." Now, remember this, the Judge, at one point, instructed MR. ROY that MR. ROY, despite the fact that he had immunity, could be indicted, tried for perjury if he lied to you in this court room.

Remember he had every incentive in the world not to lie to you in this court room because to lie to you, leaves him open to a perjury charge which he had been instructed in open court by the Court about, so he was aware of it and what did he tell you, under oath with that instruction, in this court room? He says to you, "ROBERT MARCHAND is not the man who gave me the marijuana,--he is not 'Big Foot', he is a man whom I tried to sell grass to and didn't buy it that day." He tells you in this court room that he, in effect, mis-led the Grand Jury. He tells you that he inferred that "Big Foot" and MARCHAND were one in the same, but never said they were. Why did he do that? I don't know why he did that. I don't have to know.

The Government has to prove it by some witness who can testify to you that MARCHAND and "Big Foot" are the same. What have they done? They have put two witnesses on, PERKINS and ROY, who were there and both of them from this witness stand have said to you, "No, MARCHAND is not 'Big Foot'." They have not established any motive for PERKINS to lie and the motive for ROY to lie, according to the Government, is the fact that he was middling a friend to try to get out of trouble himself.

Well, if that is the motive, the Government said he should have called,--he could have called and told MARCHAND about it. We don't know what ROY was thinking. One thing we do know, however, is that the Grand Jury testimony is secret. MR. HILLMAN told you that. He didn't even talk to ROY about the Grand Jury testimony when he went up there to talk to him because he was afraid to get involved in the secrecy of a Grand Jury testimony. MR. HILLMAN is the key to MR. ROY's testimony. HILLMAN went up and talked to him and HILLMAN told you what ROY told him that he inferred that it was BOB MARCHAND.

Remember also, that VICTOR ROY was a man who, at one point the Government had VICTOR ROY talking, testifying to a Grand Jury about an ANNE that was with "Big Foot" when he first met him and that MARCHAND had a girl-friend named, ANNE. You got the impression that the two of them were the same.

Well, I stood right here and took what we call in the trial business a gamble because I don't know the answer. I didn't know what ROY was going to say, but I was confused by the

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testimony and if I was confused, I felt you would be. You heard me say to VICTOR ROY, "Was the ANNE or the woman you saw with 'Big Foot' when you met him" for the first time in a tavern, the ANNE that is the girl friend, the fiance that lives with ROBERT MARCHAND?" And you heard him say clearly and explicitly, "No, it was not."

Don't be confused with this testimony about ANNE. The simple fact about VICTOR ROY is that VICTOR ROY was in a box, he was in trouble, and he tried to get himself out--he tried to get himself off by passing the buck, not knowing what was going to happen, but not hurting the guy at the same time. I felt really bad for him and I think you may have, too. He was trying to protect himself and yet do what was right and not hurt anybody.

The Government was in a position where they had to rely on his testimony. Now, I don't relish seeing people in trouble or in any kind of a situation that they are embarrassed by, but the Government relies on the testimony of its own witnesses and the first two witnesses the Government presents to you were PERKINS AND ROY and neither of them said that the defendant was "Big Foot." Neither of them made him as the man who provided them with the marijuana.

So, I say to you, how are you going to say that VICTOR ROY or PERKINS testified in any way that convinces you beyond a reasonable doubt that this man, BOB MARCHAND, was the supplier? All you can do, ladies and gentlemen, is to go into the jury room and guess.

When you are talking about this case and in your deliberations, keep those words in mind --Surmise, conjecture, and guess, if in fact you have to guess, surmise, conjecture, or guess that this situation leads to this, or this, or that, you can't convict a man on that kind of evidence, thank God, in this country. The proof must be morally certain and beyond a reasonable doubt and there just isn't anything that comes anywhere near that level of proof in this case.

Now, MR. HANDOGA, the Government witness, or the Government agent, told you about the pictures that he showed and the diagram. He was asked about a line-up. Why didn't he have a line-up? He said there was a continuing investigation. Well, MR. MARCHAND was arrested in August of 1976. There was no reason in the world why he didn't have a line-up after that, except one. They knew that PERKINS and ROY would never identify MARCHAND as "Big Foot" because he wasn't "Big Foot", but they would rather take their chances in court with a jury and I don't in any way ascribe any evil motive to the prosecutor about that because I am sure the prosecutor doesn't know what the police are doing as far as line-ups or the rest of it, but in any event, a line-up would have been the way to handle that and it wasn't done.

One other thing that was interesting. There were no finger-prints. You have in evidence a bunch of tapes that were taken off of some bales that were put in the car. It's July--Burmuda shorts and "Tee" shirts. People, obviously are not wearing gloves. If "Big Foot", whoever he is, is throwing bales of marijuana into a car and those bales of marijuana are later seized, why aren't there any finger-prints here? There aren't finger-prints here, ladies and gentlemen, because BOB MARCHAND's prints are not on any of that evidence that was seized.

If there were, if they did have fingerprints on it, you would have them here. That is the kind of evidence which helps prove guilt, not conjecture, surmise, or guess.

MR. HARRIS tells you, that's the agent from Florida, that he arrested MARCHAND down in Florida and there was a paper on him and this paper had certain notes on it. The notes, which you will read, had directions to ROY's home or general directions. It had some notes about, I don't even remember what they said, but they were notes. We called the witness, MR. HILLMAN, who is the civil lawyer for MR. MARCHAND's businesses and an Assistant District Attorney, and he told you that he heard on the street through people, that VICTOR ROY had testified and said something about MARCHAND. He came and saw him, called MARCHAND into his office and had MARCHAND talk to him,--told him,--told MARCHAND what he had learned and gave him directions and told him to hire a criminal lawyer.

Now, those notes are totally consistent with that kind of testimony. They are totally consistent with the innocence of MR. MARCHAND. This whole case, ladies and gentlemen, depends upon identification. Who was "Big Foot?" Who gave the marijuana to PERKINS and ROY?

Ladies and Gentlemen of the jury, I say to you, there isn't one bit of evidence, not one bit, that indicates in any way that ROBERT MARCHAND, the defendant, was the supplier of that marijuana. There is guesses; there is surmises; there is conjecture; but there is no hard evidence. There is nothing upon which you can go out to a jury room and be convinced beyond a reasonable doubt to a moral certainty that this man, MARCHAND, was the supplier of this marijuana.

I ask you, ladies and gentlemen, when you go out there, please consider this, as I know you will, a very grave matter, because it is to MR. MARCHAND, and the weight to be given to the evidence is proof beyond a reasonable doubt, to a moral certainty. I think you, as reasoning, thinking jurors, you, based upon your experience in the community abroad and in the background will realize that this evidence is not the kind of evidence that you or any of your loved ones would want to be convicted on. It is not the kind of evidence that can convince you beyond a reasonable doubt. It is not the kind of evidence upon which a conviction may be sustained.

Now, if I may have just a minute to check with my client, Your Honor, to make sure I haven't left anything out.

Ladies and Gentlemen, thank you.

MISS JACOBSON: Ladies and gentlemen, I have just a few more things which I would like to point out in light of what the very able Counsel for the Defense has said to you.

At first, you have to realize that yes, this is a serious and grave thing for MR. MARCHAND. It is also serious for the

Government. It is very important for the Government to be sure that the evidence is sufficient and that we are, in fact, only presenting cases, trying to tell the jury the truth so that you can decide if the defendant is guilty or not.

Now, some of the comments made by Defense Counsel point out the testimony about a "T-Bird" and nobody proved that BOB MARCHAND owns a "T-Bird." Well, think about it now. He is charged with distributing a lot of marijuana. He is charged with a felony. If he is a supplier; if he is really distributing marijuana, maybe he won't use his own car. You can always rent a car; he can always borrow a car; he would always do things to make it hard for people to identify him later.

Now, you have heard the testimony about when ROY and PERKINS met with this guy in Brattleboro, did they transfer all the marijuana right there in the parking lot at Howard Johnson's? No, they drove off. Somewhere along a dirt road, they went into a rest area. Why do they do something like that? They do that so people can't identify them; so people cannot see them out in the open and so people can't say, "That's the guy and I saw him--twelve people saw him standing right here." They don't want twelve people to be able to identify him.

So, he might have borrowed a car, it's always possible. He was with another man, you heard testimony that there was somebody else with him. It could be that the car belonged to the other man and MARCHAND was in it.

There was enough testimony to say it was a "T-Bird", it was simply a detail of the transaction and it doesn't prove that ROBERT MARCHAND is not the supplier.

Defense Counsel also speaks about the fact that the Government should prove that MARCHAND had a beard or that he wore glasses, or that he didn't have a beard or he didn't wear glasses on July 18th, 1975. Well, PERKINS testified and said, the supplier didn't have a beard. He picked out a picture of ROBERT MARCHAND, who looked like the supplier, the picture didn't have a beard or glasses. He drew a sketch which looks like the picture of ROBERT MARCHAND. It was a sketch of the supplier, no beard, no glasses.

Consider this. Who is the only person who has changed his appearance and what has he changed? He has changed everything he can.

MR. OTERI: Your Honor, I pray Your Honor's judgment. There is no evidence that my client's appearance was one bit different than on July 18th than it is today.

THE COURT: The Court will sustain the Defendant's objection to the argument of the Government in that regard and the Jury is instructed to disregard it.

MISS JACOBSON: You can consider, however, the testimony of RICHARD PERKINS and his identification, his description of his supplier and his selection of Robert MARCHAND's photograph.

The Government did put VICTOR ROY on the stand but, as I told you, the Government is stuck with its witnesses and the Government is not relying on VICTOR ROY's testimony as being entirely truthful. This is up to you to consider his testimony. It is up to you to consider if any part of it is true, if all of it is true or if none of it is true.

Now, the fact, as MR. OTERI brought out that the Grand Jury testimony is secret. It is kind of interesting when you think about it because if VICTOR ROY testified before the Grand Jury, he could think, "Well, it's secret, nobody is going to find out that I testified. Nobody is going to know that I'm the one who did it." And so, he could sit there and tell the truth, because it would be secret. Then, the defendant's lawyer, MR. HILLMAN, found out about it, so now it's not a secret anymore and ROY has to sit up here and testify in open court, so it is not a secret any more. So what does he do? Refuses to testify until he is given immunity, then he is willing to testify.

What does he tell you, though? "What I said in the Grand Jury was misleading." Well, what does that mean to you, ladies and gentlemen? If he sits here on the stand and he says, "Yes, I misled the Grand Jury into believing that ROBERT MARCHAND was 'Big Foot'." Well, what does that mean to mislead them? It means he was not telling the truth. But ask yourselves, has he misled the Grand Jury or has he misled you?

We have referred to a piece of paper, Government's Exhibit 11-"A" which are notes taken by ROBERT MARCHAND about information which VICTOR ROY gave to the Government with VICTOR's address on it. MR. MARCHAND's lawyer heard about that last July, sometime after VICTOR testified before the Grand Jury.

He told MR. MARCHAND about it, sometime around last July.

What did his lawyer say? He said, "You had better go get yourself a good criminal lawyer because you are in a lot of trouble." Why would he say that? If this was just a mistake and if VICTOR had lied to the Grand Jury, then MR. HILLMAN might offer to help out and say, "Maybe we can straighten this out."

MR. MARCHAND could call VICTOR ROY, who is his good friend and say, "Hey, what are you trying to do to me? You know that is not true, that didn't happen."

Instead, MR. MARCHAND just folded up that piece of paper and he put it in his wallet and he kept it and we submit to you, ladies and gentlemen, that MR. HILLMAN told BOB MARCHAND to get a criminal lawyer because VICTOR ROY had told the truth to the Grand Jury when he identified MR. MARCHAND as "Big Foot" and MARCHAND really is guilty and he and his lawyer knew it.

We submit that he saved that piece of paper because it was a warning to him from ROY, somebody who knew that he was "Big Foot" and who had told the Government that he was "Big Foot."

We submit that no one, including ROY tried to correct this mistake because it was no mistake--because ROBERT MARCHAND, the defendant, is guilty beyond a reasonable doubt.

MR. OTERI: If Your Honor please, may I have two minutes because of interjecting things not in either of our summations. All I would like is two minutes if the jury's time.

THE COURT: We will allow you a little latitude in this regard.

DEFENDANT's CLOSING ARGUMENT:

Thank you, Your Honor. Mr. Forman, ladies and gentlemen, the prosecutor interjects here some interesting new thoughts about what MR. HILLMAN was thinking, the attorney, and MR. HILLMAN's actions and what MR. HILLMAN might guess. I counted 41 guesses or thoughts, or thinks in MISS JACOBSON's statement to you and in her rebuttal--41 times in my memory and she told you to think or guess, or might have, or conjecture words. Just remember this when you go out to the jury room to deliberate. If two statements are inconsistent, if a guy lied once and he told the truth here, if he lied here and told the truth here, how can you ever take that kind of testimony and pick, "I'm going to believe that he was telling the truth here and lying here," and convict a person of proof beyond a reasonable doubt?

If VICTOR ROY lied at all, if there is any discrepancy between his testimony, how can you take that testimony and say it is proof beyond a reasonable doubt that the man is guilty? The other thing is in this case, they have to prove MARCHAND is guilty. MARCHAND doesn't have to prove he is innocent and nobody testified that MARCHAND was "Big Foot." Thank you.

THE COURT: We will take a brief recess before this case is submitted to you ladies and gentlemen.

(THE COURT RECESSED AT 10:50 UNTIL 11:07.)

CHARGE

THE COURT: Members of the jury, the Court points MR. VARGAS to serve as your forman in this case.

This is a criminal case and a criminal prosecution by the Unites States against the defendant, ROBERT MARCHAND. The case comes to the Court by way of a presentment of the Grand Jury in an indictment which charges a single count for a violation of the Drug Abuse Prevention and Control Act, Section 841-"A", one of the United States Codes.

Later in the course of the instructions, I will refer to this specific offence, charged in the indictment. Before considering that charge against MR. MARCHAND, I will instruct you concerning certain general rules that are to govern your deliberations in this case.

It is your duty as jurors to follow the law as stated in the instructions by the Court and to apply the rules of law so given to the facts as you find them from the evidence in the case. You are the sole judges of the facts. You are not to single out one particular instruction as stating the law, but you must consider the instructions as a whole and in any reference which the Court may make to the evidence or to the theories of the Government and the Defendant are done merely to help you in applying the law to the facts as you and you alone find them from the evidence.

It is not the Court's intention in any way by reference to the claims or to the evidence to indicate to you in the slightest degree how I may feel the case should be decided. That is not the Court's area. It is your province to decide the facts and yours alone.

A.478.

The fact that the defendant has been indicted by the Grand Jury must in no way influence your verdict. The indictment is nothing more, as I have indicated earlier, than a formal method of accusing the defendant of a crime, preliminary to the trial. A Grand Jury investigation is necessarily one sided. The Government presents to it, to that body, all evidence favorable to the return of an indictment, whereas the defendant has no opportunity to present evidence in his behalf before the Grand Jury. Thus, the indictment is not evidence of any kind against the accused and does not creat any presumption or permit any inference of guilt.

The defendant has pleaded, "not guilty" to the charges asserted in the indictment and under our system of law, he has no obligation to disprove the charges alleged in the indictment nor to present any affirmative proof of his innocence. He is not required to produce any witnesses in order to establish his innocence but rather, he has the right to insist that the Government, who has charged him with the offence, prove that he is guilty of that offence beyond a reasonable doubt.

He may choose to rely upon the stated evidence and no lack of testimony on the part of the defendant will supply a failure of proof on the part of the prosecution.

In accordance with our system of law, a defendant has a constitutional right not to testify and the jury has the obligation to respect his election in that regard and to draw no inference of guilt whatsoever in the fact that he has elected not to testify in this case. It is not to be considered by you in arriving at your verdict. If he takes advantage of the constitutional privilege not to testify, you are in no way to consider his failure to do so as the slightest evidence of his guilt or innocence.

The law presumes a defendant to be innocent of a crime; thus, a defendant, although he has been accused, begins the trial with a clean slate with no evidence against him. The law permits nothing but legal evidence presented before the jury to be considered in support of any charge asserted against the accused. The presumption of innocence requires that the defendant be aquitted unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after a careful and impartial consideration of all the evidence in the case.

A reasonable doubt is a doubt based upon reason and common sense. It is the kind of doubt that would make a reasonalbe person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it, unhesitatingly, in the most important of your own affairs.

While bearing in mind that it is rarely possible to prove anything to an absolute certainty, the jury will remember as well that the defendant is never to be convicted on mere suspision or conjecture. The burden is always upon the prosecution to establish the defendant's guilt and this burden does not shift to a defendant, for the law never imposes upon

A. 480.

a defendant, in a criminal case, the burden or the duty of calling any witnesses, or producing any evidence for that matter. So, a reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that the defendant is guilty of the charge.

So, if the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, the jury should, of course, adopt the conclusion of innocence.

The evidence in this case, as in all cases, consists of the sworn testimony of the witnesses, regardless who may have called them and in all the facts that have been admitted or stipulated and all exhibits, regardless who may have produced them and any evidence as to which an objection was sustained by the Court and any evidence ordered stricken by the Court must be entirely disregarded.

You are to consider only the evidence in the case. In your consideration of the evidence, you are not limited to the bald statements of witnesses. In other words, you are not limited solely to what you see and hear as the witness testifies. You are permitted to draw from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

So, there are two types of evidence, direct evidence and circumstantial evidence. Direct evidence means evidence that directly proves a fact and which in itself, if true, conclusively establishes that fact, such as the testimony of an eye witness. Circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn. It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combindation of direct evidence and circumstantial evidence.

The law makes no distinction between direct and circumstantial evidence but simply requires that before convicting a defendant, the jury must be satisfied of the defendant's guilt, beyond a reasonable doubt.

We all use circumstantial evidence in our daily affairs. For instance, the other morning when we were snowbound, to give a simple illustration, I looked out of my window to see whether or not the mailman had arrived. Living in a rural area, we have a mail-box where the mail is delivered by a rural carrier. After looking out my studio window, I was able to see automobile tracks which led to my mail-box and so, I used that circumstantial evidence as an indication that the mailman had been there. Sure enough, when I went out, the mail was in the mail-box. That is simply a homely illustration of circumstantial evidence.

As I have indicated, we all use circumstantial evidence in our daily affairs and so, it is proper for you to consider it in the trial of this case.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight to be given their testimony.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. As I have indicated at the outset of the trial, consider each witness' intelligence, his motive, his state of mind, his demeanor, and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters.

Consider also, any relations which each witness may bear to either side of the case. The manner in which each witness might be effected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. Consider inconsistencies or discrepancies in the testimony of witnesses or a witness, or between the testimony of different witnesses may or may not cause the jury to discredit such testimony.

Two or more persons witnessing an incident or transaction may see or hear it differently. An innocent misrecollection or failure of recollection, is not an uncommon experience with any of us.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood. Also, the testimony of a witness may be discredited or impeached by showing that the witness had been convicted of a felony, that is a crime punishable by imprisonment for a term of years. Both witnesses, PERKINS and ROY have been convicted for their part in a criminal enterprise involving the marijuana transactions on July 18th, 1975.

Prior conviction on the part of a witness does not render the witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of each of these witnesses.

Again, it is the province of the jury to determine the weight to be given to any prior conviction as impeachment. A witness may be discredited or impeached by contradictory evidence or by evidence at some other time the witness said something or failed to say or do something which is inconsistent with his present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you think it deserves. If a witness has shown knowingly to testify falsely concerning any material matter, you have a right to distrust such a witness's testimony in other particulars and you may reject all of the testimony of that witness, or you may accept some in part and reject others, but give it such credibility, in either aspect, as you think it deserves.

Now, an act or omission knowingly done if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reasons., again, you will have to make your own judgment, ladies and gentlemen, you must give the testimony of each witness such credibility, if any, as you may think it deserves.

Now, the Government witnesses, RICHARD PERKINS and VICTOR ROY, were admittedly participants in the crime charged in the indictment. The Government frequently must use such testimony because otherwise, it would be difficult or impossible in some instances to detect or prosecute wrong doers. The testimony of an accomplice is not to be rejected, unless the jury thinks it has no weight. Like any other fact, it is to be taken up and dealt with by the jury, by you who are the triers of the fact. If an accomplice could not be used, there are many cases where there is real guilt and where a conviction should be had, where a conviction would not otherwise be obtainable. So, it is that their evidence should be properly considered by the jury, but their testimony must, however, be received with caution and weighed with great care.

You have been previously instructed that the statements and arguments of Counsel are not evidence in the case, unless made as admissions or as a stipulation concerning the facts and when the attorneys on both sides stipulate, or agree as to the existence of certain facts, you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact or the facts agreed upon as proved.

Now, in this trial, the defendant himself, his counsel, and the Assistant United States Attorney have stipulated and agreed to certain facts and their formal stipulations have been read to you in evidence. Their stipulations concerns the chemical analysis made by GLADSTONE GRIFFIN, the chemist of the Drug Enforcement Administration, of the substance that was ceased by the Drug Enforcement Officers from the possession of VICTOR ROY and RICHARD PERKINS in Burlington on July 18, 1975, and it is agreed that if MR. GRIFFIN was called as a witness, he would testify that he found the substance, I believe it is in Government's Exhibits #14-"A" through "H", to be marijuana, which is chemically known as "cannabis."

It is further agreed, by the defendant and the Government, that Special Agent Bertrum, of the Drug Enforcement Administration, had he been called as a witness would testify concerning the weight of the total substance and the disposition that was made of the contraband.

The defendant's Counsel, the defendant himself, and the Government have also agreed that if representatives of the Waitsfield Fayston Telephone Company and the New England Telephone Company were called as witnesses. These company representatives would present certain records kept by the companies concerning telephones listed to RICHARD PERKINS in Waitsfield, Vermont and telephone subscribed by ANNE CURTIS and ROBERT MARCHAND in Gilford, Vermont during the period of time that you have under consideration. These, of course, concern the toll calls made to and from these particular telephone stations. So, you are to accept the contents of the stipulations as evidence in the case and thus, the stipulated facts may be used for any proper inference that you may find arises from the stipulated evidence.

A.486.

Now, turning to the indictment and the crime charged in the indictment. The GRand Jury has charged in a single-count that on or about July 18, 1975 in the District of Vermont, ROBERT MARCHAND, the defendant, unlawfully, wil-[illegible]lly and knowingly did distribute and possess with intent to [illegible]stribute, one hundred eighty pounds of marijuana, a Schedule One controlled substance in violation of the provisions of Title I, in violation of the provisions of Title 21 of the United States Code. In particular, Section 841.

21 United States Code, Section 841 upon which the indictment is based, provides that it shall be unlawful for any person knowingly or intentionally, to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense, a controlled substance and the same title of the United States Code sets forth a list of controlled substances.

This section which is Section 812, as amended by the Code of Federal Regulations, this marijuana is a Scheduled One substance. So, you may consider, as a matter of law, that marijuana is a controlled substance.

You may not be concerned with the reasons why marijuana is so scheduled and placed in this category of prohibited substances for these factors are not material to your consideration of the case.

In order for you to determine that the defendant, ROBERT MARCHAND is guilty of the offense charged in the indictment, you must be persuaded beyond a reasonable doubt each of of these essential facts. One, that the substance that was delivered by the person referred to in the evidence as "Big Foot," or "Bob," to RICHARD PERKINS and VICTOR ROY, in the vicinity of BRATTLEBORO, VERMONT on July 18, 1975, was marijuana.

Two, that the person known as "Bit Foot who participated in the delivery of the marijuana was the defendant, ROCERT MARCHAND.

Next, that the defendant, MARCHAND possessed the marijuana with the intent to distribute it.

Four, that the acts of the defendant in possession and distribution of the marijuana was done unlawfully, wilfully and knowingly.

The word "distribute" as used in the statute means the actual constructive or attempted transfer or delivery of the controlled substance.

It is not necessary the Government prove that someone actually distributed the controlled substance rather only, that it was possessed.

The intent to distribute it and the word "possessed" within the meaning of the statute has its common every day meaning, that is, to have something within one's control.

To have something in one's control does not necessarily mean to have it in your hand or your pocket, but it means that you have actual or constructive ability to deal with the subject.

The word "intent" refers to a person's state of mind. So that the term "possess with intent to distribute" can be fairly stated to mean to control a substance with a state of mind or purpose to transfer that substance.

So, as I have indicated, the charge of the indictment is that the defendant possessed marijuana with intent to distribute and also charges him with the act of distribution of the marijuana.

I have also instructed you as a matter of law, that marijuana is a Scheduled One controlled substance. However, you are required to find, beyond a reasonable doubt, that the substance alleged to have been distributed here was in fact, marijuana and you may accept, in deciding whether the substance was marijuana, the stipulation of the Government and the defendant concerning the testimony of the Government Chemist, GLADSTONE GRIFFITH, had he been called to testify.

Again, the statute refers to the terms "unlawfully, wilfully and knowingly" and the use of these terms in the statute and in the indictment, means that you may be satisfied, beyond a reasonable doubt, that the defendant knew what he was doing and that he did it deliberately and voluntarily as opposed to mistake or accidental, or as a result of some other innocent reason.

Of course, it is not necessary that the defendant knew he was violating any particular law of the United States, rather it is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his act.

An act is done knowingly if it is done voluntarily, intentionally and not because of mistake, accident, or other innocent reason and intent exists in the mind and since it is not possible to look into a person's mind to see what went on there, the only way you have at arriving at a decision on this particular question, is for you to consider all the facts and circumstances demonstrated by the evidence, including exhibits and to determine from all such facts and circumstances whether the requisite intent was present at the time in question.

Direct proof of course, of intent, is unnecessary and in fact, it is usually impossible. And, intent may be inferred from all the surrounding circumstances.

While the burden is on the Government to establish each of the elements by the required proof, the theory of the defense in this case is that he was not involved in the commission of the offense with which he has been charged. It is his position that the Government witnesses must have falsely testified against him for reasons of their own. Such as for benefits from the Government in relation to the charges filed against the Government witnesses, ROY and PERKINS or, perhaps, maintaining their benefits or their probationary status that was previously granted.

Now, since the evidence in the case raises the principle question of whether the Defendant was in fact the criminal actor, this necessitates your resolving any conflict or uncertainty in the testimony on that issue.

A.490.

In appraising the identification testimony of a witness, you should consider whether the witness had the capacity and an adequate opportunity to observe the offender. Consider any occasion in which the witness failed to make an identification of the defendant, including his in-court identification or whether he made any identification that was inconsistent with the identification or failure of the identification at the trial. And finally, you must consider the credibility of each of the identification witnesses in the same ways as any other witnesses.

Consider whether he is truthful and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

The burden of proof is on the prosecution with reference to ever element of the crime charged and this burder includes the burden of proving, beyond a reasonable doubt, the identity of the defendant as the perpetrator of the crime charged.

Bearing on this crucial issue, you may consider the identification given here in court by the witnesses, PERKINS and ROY, as to their inability to identify the defendant or "Big Foot," or "Bob." You may also consider the evidence in the case concerning the prior photographic identification by the witness PERKINS in his interviews with Special Agent HANDOGA, in April 1976, the description of "Big Foot" that PERKINS gave to the Drug Enforcement officers after his arrest on July 18, 1975.

You may also consider the sketch that PERKINS prepared and turned over to Agent HANDOGA.

Now, as to the identification testimony of the witness, VICTOR ROY, this witness, although called by the Government, failed to make an in-court identification of the defendant as the person who delivered the four bales of marijuana to PERKINS and to him at BRATTLEBORO on July 18, 1975. He was examined and cross-examined on this point and you may recall that it developed during ROY's examination that he testified differently when he appeared before the Grand Jury in the investigation of the crime that is charged here.

Now if you find that the witness ROY on that occasion before the Grand Jury, did identify the defendant MARCHAND along with his girl companion ANN CURTIS as the same person as "Big Foot" whom he had previously seen with ANN CURTIS, you may consider his testimony to the Grand Jury as substantative evidence of the facts as he represented them to be in his testimony to the Grand Jury and this is so, although the witness ROY has stated he misled the Grand Jury and was not entirely truthful to that body.

It is for you the Jury to determine in the light of all the evidence in the case bearing on the question which testimony of ROY is true. His testimony at the trial, or his testimony before the Grand Jury in July of 1976.

In resolving this important issue, you may also consider the exhibits in the case with reference to the telephone calls on or about the time in question. Of course, you should also consider any explanation of these calls suggested by the witness, ROY.

Bear in mind that you are concerned in this case with the guilt or innocence of the defendant, MARCHAND. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the built of the accused, you should so find, even though you may believe one or more other persons are also guilty, but if any reasonable doubt remains in your mind after a careful and impartial consideration of all the evidence in the case, it is then your duty to find the accused "not guilty".

Your verdict in this case must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agrees to that verdict. Your verdict must be unanimous and it will be announced by your Foreman in open court.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the Marshal signed by your Foreman or by one of the Jurors, addressed to the Court. No member of the Jury should ever attempt to communicate with the Court by any means other than a signed writing and the Court will never communicate with any member of the Jury on any subject, touching the merits of the case otherwise than in writing or orally in open court.

You will note from the oath about to be taken by the Marshal, who will have you in charge, that the Marshall, too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the Jury on any subject touching the merits of the case and bear in mind also, that you are never to reveal to any person, not even to the Court, how the Jury stands numerically or otherwise on the question of the guilt or innocence of the accused and until after you have reached a unanimous verdict.

You have been chosen as jurors in this case to try the issues of facts presented by the allegations of the indictment against the Defendant, MARCHAND and his denial of those allegations implicit in his plea of "not guilty" to the charges.

You are to try the issues that have been presented to you according to the oath that you have taken as jurors and in which you have promised that you will well and truly try the issues raised in thiscase and render a just verdict.

Both the defendant and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated in these instructions and reach a true and just verdict.

The Court will entertain objections to the instructions.

(AT THE BENCH OUT OF HEARING BY THE JURY)

THE COURT: The Government?

MISS JACOBSON: We have no objections, Your Honor.

THE COURT: Mr. Weinberg?

MR. WEINBERG: Our first objection, Your Honor, would be, .. the first objection, Your Honor, would be to your allowing the Jury to use Mr. ROY's Grand Jury testimony substantively.

We would object both because there was no evidence of an I.D. of MARCHAND in the Grand Jury that came out through the evidence.

Secondly, there were no statements within Rule 801.

Third, because there couldn't have been any introduced because of the taint issue coming from the, your exclusion of the pre-trial photographic identification.

Moreover, I think Your Honor inadvertently invited the Jury to guess which is truthful by asking them to make that kind of decision.

I ask Your Honor to instruct the Jury they can't surmise, conjecture, or guess when ROY told the truth because there wasn't enough evidence to base that kind of a judgment on.

We object to your failure to give the following instructions, 21, 26, 27, the two supplemental instructions that involved accomplices and there, we would specifically object to Your Honor's instructing the Jury that the Government needs accomplices or wrongdoers wouldn't be brought to justice and ;ask the Jury not to infer that in fact, Mr. MARCHAND was a wrongdoer.

THE COURT: Yes.

MR. WEINBERG: And Instructions 17 and 18, we object to that not being given and specifically we further object to -

THE COURT: What are you referring to there?

MR. WEINBERG: To scrutinize identification testimony carefully and also the testimony tending to prove identity is to be scrutinized with extreme care.

THE COURT: We will note your objection.

MR. WEINBERG: Further, we would object regarding Your Honor's permitting the Jury to use the pre-trial identifications by PERKINS, substantively, the sketch, substantively, on the grounds that it wasn't reliable, on the grounds that it was a tentative identification, on the grounds that in any case, it doesn't fall within Rule 801.

Lastly, two points, as Your Honor mentioned guilt or innocence, I would ask Your Honor to instruct the Jury that they don't have to find the defendant innocent. They only have to find him "not guilty," which means the Government has not proven him guilty, beyond a reasonable doubt.

Finally, I would ask Your Honor again on the toll records, which were mentioned two or three times, the toll records were a, the attention was called to the toll records both in view of Mr. Roy's testimony and also in view of the stipulation.

We say, Your Honor, the Jury is not entitled to surmise, conjecture, or guess what the calls were, apart from what the evidence was.

Those would be the objections of the defendant.

ADDRESSING THE JURY:

THE COURT: To avoid any misunderstanding the

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point the Court indicated to the Jury that you may consider the testimony given by the witness ROY before the Grand Jury as evidence of the fact as he then stated them to be and also, of course, you may consider the testimony of the witness in Court and his inability to identify the Defendant, MARCHAND as "Big Foot" here in Court.

In this, as in all matters that relate to inferences, or the examination of all of the evidence in the case, you must, in considering the evidence against the accused and in considering evidence in his favor, you must not base your berdict or inference on speculation, conjecture or guess and that rule of course, applies to determining whether the testimony given before the Grand Jury was true or whether the testimony in Court was correct, the testimony of the witness ROY in court.

IN all matters that relate to the Government's burden of establishing the defendant's guilt beyond a reasonable doubt, you are not permitted to engage in mere speculation, speculation, conjecture, or guess work in any form.

Each element of the offense as I have indicated to you to sustain a verdict of guilty, must be proved, beyond a reasonable doubt. Anything further?

MR. WEINBERG: No, Your Honor.

THE COURT: The Court will leave it to counsel to determine the exhibits and only the exhibits that have been received in evidence that will be submitted to the jury and of course, you will have the exhibits to take with you in the jury room at your request.

If there is any testimony that you wish to refer to during the course of your deliberations, as in all cases, if you will notify the Court in writing through your Foreman that there are certain portions of the testimony that you would like to have read back, the Court will alert Mr. VESPER to the fact that you wish to refer to some of the evidence and he will have to go through his notes and find the particular part of the testimony that is requested and that will, may take a little time, so as much advance notice as possible concerning any request of this nature, should be made as soon as you have decided, if that is your decision, that you wish to have certain passages read, let the Court know as far ahead as possible.

Will the Marshal come forward and be sworn?

(Marshal duly administered oath at 11:50 a.m.)

THE COURT: At this time the Court will excuse you, Mrs. RICHARDS and thank you for your attendance. I know this as in all cases, it is very important to have a stand-by juror and particularly in the weather that we have had in the past few days, some juror might some time be unable to get here because of the severity of the weather, but in any event, we are glad we didn't have to call upon your services but be assured that your participation in the trial was an important function and the Court again thanks you. Ladies and Gentlemen, you may take the case.

(The Jury retired at 11:51 a.m. to deliberate upon a verdict).

(At 2:54 p.m. the jury returned to the court room for the purpose of requesting certain testimony to be read back by the reporter)

THE COURT: The Court has received a communication addressed: "To Your Honor: We would like to hear the testimony of Mr. VICTOR ROY, signed LAYNE E. VARGAS, The Foreman". The Court will receive the message and mark it Court's Exhibit #1 and I believe Mr. VESPER has the testimony or his notes ready to read back to you. Wo you wish to have all of Mr. Roy's read?

THE FOREMAN: Yes, please.

(At this point the entire testimony of VICTOR ROY was read to the jury by the court reporter)

THE COURT: Is that what you wanted?

JUROR TATRO: Didn't she ask him more questions?

THE COURT: That was the direct and cross examination of Mr. Roy, is there anything further?

THE FOREMAN: No.

(The Jury at 3:25 p.m. again retired to the jury room to further deliberate upon a verdict).

(At 4:58 p.m.the Jury returned to the court room to deliver their verdict).

THE COURT: The Court has received a communication from the Jury which indicates to the Court they are ready to report.

THE CLERK: Mr. Foreman, will you rise please? Has the Jury reached a verdict?

THE FOREMAN: Yes, we have.

THE CLERK: And what is the verdict of the Jury?

THE FOREMAN: We find the defendant guilty.

THE CLERK: So say you all, ladies and gentlemen?

JURORS: Yes.

MR. WEINBERG: Will the Jury be polled, Your Honor?

THE COURT: Yes, it will be.

THE CLERK: Ladies and Gentlemen, would you please answer to your name when called and tell us what your verdict is?

THE COURT: We will ask the Jury to rise.

THE CLERK: Mr. VARGAS?

MR. VARGAS: Guilty.

THE CLERK: Mr. TATRO?

MR. TATRO: Guilty.

THE CLERK: Mr. LEWIS?

MR. LEWIS: Guilty as charged.

THE CLERK: Mrs. WHITE?

MRS. WHITE: Guilty.

THE CLERK: Mrs. SULE?

MRS. SULE: Guilty.

THE CLERK: Mrs. PISCOPO?

MRS. PISCOPO: Guilty.

THE CLERK: Mrs. RUSSELL?

MRS. RUSSELL: Guilty.

THE CLERK: Mr. RICHARDS?

MR. RICHARD: Guilty.

THE CLERK: Mrs. STILWELL?

MRS. STILWELL: Guilty.

THE CLERK: Mrs. HAAS?

MRS. HAAS: Guilty.

THE CLERK: Mrs. LAYDEN?

MRS. LAYDEN: Guilty.

THE CLERK: Mr. HUDSON?

MRS. HUDSON: Guilty.

THE COURT: You may be seated. The verdict of the Jury will be accepted, ladies and gentlemen, and the Court thanks you for your participation during the trial of this case and you will be excused until Monday morning at 9:30. In this connection the Court has received a request concerning your further service, Mr. VARGAS, and the Court would like to discuss it with you after the Jury has left. The Court will indicate at this time that we will excuse you subject to call and it may be that we will need your services prior to that time but that is the message the Court wishes to discuss with you and you may be, if you wish to discuss it further, you may come into my Chambers at the conclusion. The Jury will be excused and thank you, ladies and gentlemen. (5:00 p.m.)

(JURY WITHDREW FROM THE COURT ROOM)

THE COURT: The Government have anything to say regarding the bail in this case? Is there any reason why it should not be continued?

MISS JACOBSON: No, Your Honor. We have no object to continuing bail.

MR. WEINBERG: Same bail?

THE COURT: The bail as originally set in this case, I believe by the Magistrate in florida?

MISS JACOBSON: That is correct, Your Honor.

THE COURT: In the amount of $10,000.00 will be continued. The Court will order a pre-sentence investigation in this case. The case will be recessed until the pre-sentence investigation has been completed and the report made to the Court. Of course, the pre-sentence report will be made available to counsel for the defendant and to the defendant himself, in advance of the sentencing hearing and you will be notified when that will be done. The defendant should keep his counsel advised as to his whereabouts so he will be available for interview by the United States Probation Officer for this District and I believe Mr. DEAN is here now, perhaps you would like to see the defendant at this time.

MR. WEINBERG: Would Your Honor have any objections to the P.S.I. being done in Boston, which is really the State of residence, of his employment and the residence of his relatives.

THE COURT: I am sure that the United States Probation Officer will call on the Probation Officer of the District of Massachusetts to assist in some regard.

MR. WEINBERG: Thank you, Your Honor.

THE COURT: The Court will recess until Monday morning at 9:00 o'clock. Thank you, gentlemen. I will say that the case was thoroughly tried by both counsel for the Government and for the defendant.

MR. WEINBERG: Thank you, Your Honor.

MISS JACOBSON: Thank you, Your Honor.

(5:05 p.m.)

CERTIFICATE

I, Herman J. VESPER, Official Court Reporter, United States District Court, For The District of Vermont, hereby certify that the foregoing 368 pages are a true and complete transcript of the trial in the case of THE UNITED STATES OF AMERICA versus ROBERT P. MARCHAND, Criminal Action Number 76-51, which was tried before The Honorable JAMES S. HOLDEN, Chief, U.S. District Judge, For The District of Vermont and a Jury, at RUTLAND, VERMONT, during the period 5-12 January 1977.

Herman J. Vesper
Official Court Reporter.

Rutland, Vermont
4 February 1977.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA V. ROBERT P. MARCHAND, JR.	No. 76-51

MOTION TO SET ASIDE THE VERDICT AND ENTER JUDGMENT OF ACQUITTAL

Now comes the defendant, Robert P. Marchand, Jr., who, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, moves that this Honorable Court set aside the verdict of guilty and enter a judgment of acquittal in the above-captioned matter. The defendant assigns the following grounds:

1. That there was no in court identification testimony that the defendant was the individual who distributed marijuana to Richard Perkins and Victor Roy on July 18, 1975;

2. That any out-of-court testimony by Richard Perkins, linking the defendant to the crime charged was tentative, not positive in nature (that the defendant's photograph most closely resembled "Big Foot" from those photographs displayed to Mr. Perkins) "unreliable" and was not sufficien to warrant the submission of the case to the jury. See United States v. Keller, 512 F. 2d 182, (3rd Cir. 1975);

3. That any out-of-court testimony of Victor Roy linking the defendant to the crime charged was tentative in nature, tainted by impermissibly suggestive pre-trial photographic procedures, and not in conformity with Rule 801(d)(1)(A) of the Federal Rules of Evidence.

By his attorneys,

Joseph S. Oteri

Martin G. Weinberg

Richard White

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

---------------------------------)
The United States of America)
)
vs) Criminal Action #76-51
)
ROBERT P. MARCHAND)
)
---------------------------------)

Hearing on DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AND ENTER JUDGMENT OF ACQUITTAL AND IF DENIED, FOR SENTENCING, before The Honorable James S. Holden, Chief, U.S. District Judge, at Rutland, Vermont, 18 February 1977.

APPEARANCES:

The Honorable JILL JACOBSON
Assistant United States Attorney

JOSEPH OTERI, Esquire
MARTIN WEINBERG, Esquire
Attorneys for the Defendant.

THE COURT: You may call the case Mr. Lafayette.

CHIEF DEPUTY CLERK LAFAYETTE: Your Honor, the case before the Court at this time is Criminal Number 76-63-1, The United States of America versus Robert MARCHAND. The Government is represented by Miss JACOBSON, Assistant United States Attorney, Paul J. PICHER, Chief Probation Officer, also present at the Government's table. The Defendant is present in court with his attorneys JOSEPH OTERI and MARTIN WEINBERG. The matter before the Court is hearing on Defendant's Motion to set aside the verdict and enter Judgment of Acquittal and if denied, for sentencing.

THE COURT: Mr. OTERI, do you wish to argue the motion to set aside the verdict?

MR. OTERI: Your Honor, if Your Honor Please, my partner Mr. WEINBERG will argue that motion.

THE COURT: Very well. Mr WEINBERG you may proceed.

MR. WEINBERG: Thank you, Your Honor. I will not be extensive. We have filed Memoranda.

THE COURT: Yes, the Court has had an opportunity to read your extensive Memoranda that was filed, Mr. WEINBERG in the case, but we will certainly afford you the opportunity to address the points orally for a reasonable period of time.

MR. WEINBERG: Thank you, Your Honor, just briefly. We are sort of in a unique position at this stage, particularly in the context of the trial where in the voir dire, the pretrial hearings were right before, because of Mr. Roy's immunity

A. 507.

situation where they'd were right almost in the context of the trial to have the transcript, which of course, we didn't have at the time we argued the original Judgment of Acquittal motion. To be able to address the situation almost as in an appellate court a first resort and our ability to really carefully delineate the facts as the transcript presented them that occurred during the trial itself and relate them to various case law and present them by way of memoranda. And, just as an introduction we would ask the Court orally in its role as a supervisor of the jury as Judge FRIENDLY says, in the TAYLOR case I just quoted that it's a difficult thing for the defense lawyers to ask a Court to take a verdict away from a Jury. Juries come in with many days of trial, yet despite the difficulty in that position, the Court's instruction to the Jury shall not conjecture, surmise or speculate, really creates the framework for our motion because it is our position that despite the verdict, that there had to be, on the basis of the evidence presented, or affirmative evidence by the Government, there had to be the kind of conjecture as to whether or not our client is guilty or innocent, that the Court is explicitly authorized to supervise by precluding that kind of a verdict, or in this case by setting it aside.

When the evidence is reviewed, first with Mr. PERKINS and then with Mr. ROY, the PERKINS evidence just lacks affirmative basis of certainty. The in-court identifications were, as we recall was that there were several people that resembled BIG FOOT. BIG FOOT being the source of the marijuana.

That Mr. MARCHAND was one of several people, that Mr. PERKINS said that he did not recognize Mr. MARCHAND as BIG FOOT and he felt that he would recognize BIG FOOT if BIG FOOT was standing before him.

So we don't have the kind of in-court identification upon which a Jury could base a verdict of guilty. The position taken by the Government in its Memorandum that I received several weeks ago, relied at least in part on the pre-trial identifications, but Mr. PERKINS' mind, those pre-trial identifications were only tentative in nature. It was always, of the pictures that I was shown, Mr. PERKINS said, the twenty or so photos, Mr. MARCHAND's picture was closest to BIG FOOT. But he said both at the pre-trial stage and the trial stage, that was not a positive I.D., he was not certain and the other pictures didn't look anything like BIG FOOT and therefore when asked to select the pictures, as Mr. PERKINS remembers it, most closely resembled BIG FOOT, he selected the picture of Mr. MARCHAND.

The Court made a finding of fact at the pre-trial stage that that was not a positive identification. And I think that was consistent with both the pre-trial and trial evidence.

Agent HANDOGA's testimony was more positive but that only went to what was in his mind when he asked him to select the picture. Agent HANDOGA can't interpret the mental process of Mr. PERKINS. Fortunately, we had Mr. PERKINS' mental processes as a witness and he said as he was looking through the pictures to see the closest one. So what you have out of PERKINS is an in-court I.D. of a resemblance as did many other people. Two others, based mostly on the color of his hair and an out-of-court I.D. that was a tentative description as general, a sketch that fits many people and selection of a photo which he said was the only one that in any way resembled BIG FOOT, the fellow he got the marijuana from.

PERKINS by himself is not supportive of a verdict of guilty. Cases that we cited, the KESSLER case, the JOHNSON case, deal with look alikes, resemblances, lack of positive I.D. And that's what PERKINS gives you. A lack of - no I.D. definite. In fact if anything, his in-court I.D. was that Mr. MARCHAND wasn't the person. He looked at it and said "That's not BIG FOOT, I would resemble, I would be, I would be able to identify BIG FOOT if I saw him.

Importantly, is the fact that Mr. MARCHAND had a beard in court. The Government whose obligation it is to demonstrate the evidence, never presented any evidence that Mr. MARCHAND did or didn't have a beard back in July of '75. The only evidence, there was a question of AGent HARRIS when he arrested him, there was no evidence in the record that when he arrested him in August of '76, Mr. MARCHAND did not have a beard. But back in '75, there is no evidence the Government, no one called any of the landlords where Mr. Marchand was living, friends. There was no evidence. There was an absence of evidence and of course the burden is not on us to gap the hole. So if all of the identification of BIG FOOT is that he didn't have a beard in July of '75, if Mr. MARCHAND had a beard and certainly a reasonable doubt he did. District Attorney from Worcester County, Mr. Hillman said Mr. Marchand had a beard on and of and didn't know honestly whether he had one that month or not. If he had a beard, he wasn't BIG FOOT and there is no evidence that he didn't have a beard, that this man didn't have a beard back in July of '75. To combine that with PERKINS not making a definite in-court I.D. and in fact the opposite, saying it wasn't Mr. Marchand. Never did the Government suggest that Mr. PERKINS was lying or had any motive to switch the evidence around. That this wasn't his friend. PERKINS cooperated right from the beginning from the first week, never said Bob Marchand was Big Foot but it was always a broad description, a broad sketch, PERKINS said it wasn't a very good sketch; then a photograph that he picked out and said this is the best of the twenty, but none of the others looked anything like the sketch and finally, when he finally he says, when he sees the man and says, "That's not him."

The toll records merely show an association between Roy and Marchand was admitted. They knew each other on prior occasion, in fact ROY said he tried to sell Bob the marijuana which Bob didn't accept on the day in question, the 18th and that was the basis of all those phone calls.

With Roy, the only evidence of Roy's negative evidence, Roy stated in court Bob Marchand was not Big Foot. Roy stated that I, and in response to the United States Attorney's questions, did you try to mislead the grand jury on prior occasions, Roy said, "It is my opinion that I tried to mislead the grand jury." That, we suggest, is not an affirmative statement that Bob Marchand is Big Foot.

Never in the transcript as opposed to the pre-trial hearing, does Victor Roy ever say to the Grand Jury, in a way that's admissible under the Federal Rules which change the law around, that Bob Marchand is Big Foot. In fact, the only evidence of that is tainted and excluded because of the pre-trial photo I.D. which Your Honor excluded on a prior basis.

So all you have out of Victor Roy is an opinion, I tried to mislead the Grand Jury but when he comes down to positive, affirmative evidence in court, he says Bob Marchand is not Big Foot.

The Jury is entitled to disbelieve that evidence, but they are not entitled to believe the opposite, because they need some affirmative evidence. The Jury had no basis really to judge well why did Roy do this, why did Roy do that. There was never a grand jury transcript until - never definite statements that this man was Big Foot. So that Roy cannot support a jury verdict, because the only thing Roy said is really two things, one is my opinion that I was trying to mislead the grand jury. That's classical impeachment material. An opinion did on a prior statement, different than the in-court testimony and we don't - we didn't object because that was the, you know, least of the foundation of that evidence was that impeachment evidence which we asked for by way of instruction. The other thing that - confusion over the

ANNE, is that ROY said that ANNE CURTIS, who he knows is BOB MARCHAND's fiance was not the ANNE he saw BIG FOOT with and the Grand Jury he said, I think there was an ANNE with BIG FOOT when I met him. "I think," not definite evidence. And when he got questioned in court, he said that, you know, there may or may not have been a girl there or she may or may not have been ANNE. We can disbelieve that. We can say that he said at the Grand Jury "I think ANNE was with BIG FOOT." That again, is a tentative statement. It's not a definite statement and neither PERKINS nor ROY supports the verdict.

So what we're really asking for, Your Honor, on the examination of the transcript, we didn't learn until the trial was over, we didn't have the daily copy, we were unfortunately unable to give Your Honor the timely motions which were originally filed. All the details pin-pointing it to the transcript and that is our fault to a certain extent, particularly in the context where we had all these pre-trial hearings on the same day merging in, in at least my mind, but now we are really able to slice out what was inadmissible and admissible, what went to the Jury, what went to the Court at prior hearings. We really don't have affirmative, positive evidence upon which a Jury can base their verdict. All we have is the toll records that associate PERKINS saying, "they look a little bit alike," picking out a picture saying that is a tentative I.D. and then saying when you look at it in court, "That's not the man." This is Mr. PERKINS, the Government witness who had no motive to lie or switch evidence, who has been cooperating right from the start. And you have Mr. ROY "waffling" around and it's not our fault. It's not our witness. The Government witnesses were called, there were accomplices, the Court instructed correctly that their evidence should be scrutinized aND the whole picture on the basis of the law which I need not go into again, the KESSLER case and the other ones go into PERKINS to show that PERKINS cannot of himself be relied upon to support a verdict.

What you have is inference upon inference, upon inference. maybe he's right, maybe he's wrong, maybe PERKINS was right back then and maybe he's wrong now. But, you don't have the foundation of that evidence upon which a man can be convicted and Your Honor, without going into a final argument kind of thing, beyond reasonable doubt is the only protection people really have to conjecture, surmise and guesswork. Innocence is not appealable. Nobody really knows what happened on July 18th. None of us were there and the reason the Jury really has to only get cases where there is great evidence, where there is evidence which doesn't leave a reasonable doubt is to protect people.

You really should ask the Court on the basis of what I said in the Memorandum to please reconsider the denial of the motion on the prior occasion , to please consider the transcripts and on the basis of the evidence to please enter a verdict of acquittal for Mr. Marchand. That doesn't mean he's innocent, it means there wasn't enough evidence in this case.

THE COURT: Miss Jacobson?

MISS JACOBSON: Thank you, Your Honor. Before I start, I guess I'd like to apologize for handing this in at this time but we just got the defendant's memorandum on Monday. It's hot off the press.

I would briefly address, as I did briefly in this memorandum since we didn't really have time to go into the evidence in detail, the fact that the defense seems to rely on RICHARD PERKINS' testimony as saying that that's not enough to convict Robert Marchand; well, we agree with that. We don't think that RICHARD PERKINS' testimony is enough, but we submit that there was other evidence that was admitted at trial and that is admissible that would serve to convict the defendant and would certainly warrant sending the case to the Jury for their judgment.

I would reiterate as I have in the Memo that the standard for sending a case to the Jury is not that the Judge has to find guilt beyond a reasonable doubt, he simply has to find that the Jury might find guilt beyond a reasonable doubt. They might notbut they might, and that's the standard upon which the case was submitted to the Jury.

Now, RICHARD PERKINS did not identify the defendant in court, his photographic identification could have been taken as less than positive. He did also give the early description and the sketch which we submit is an addition to that first verbal description he gave AGent HANDOGA but in addition to those things, RICHARD PERKINS also identified the telephone number. He claimed that his recollection was refreshed on the stand when he looked at a whole series of numbers, he picked one out and said that could be the one, I think that's the one we used to call Big Foot. And he testified at another time that he didn't know Robert Marchand, he didn't know that name. He'd never learned Robert Marchand's name before July 18, 1975, in fact, he probably didn't even learn it until after he looked at the pictures, which was in April of '76. . .

So he would have no reason to pick out a telephone number for Robert Marchand or for ANNE CURTIS. He picked out a number that he thought was used to get BIG FOOT. That number turned out to be ANNE CURTIS' number which was installed in the same house as the one ROBERT MARCHAND lived in.

The toll records, we submit, based on RICHARD PERKINS' selection of that number and other evidence that came in later on were sufficient to show more than mere acquaintanceship. There were calls made on these specific days in question, several calls and although Victor ROY claimed that he was calling Mr. MARCHAND, who was a good friend of his, it is interesting to note that the number he called was not Mr. Marchand's number but Anne Curtis' number.

We feel, in addition, we feel that Roy's testimony was completely impeached by his own statements that he mis-led the Grand Jury, not that it was his opinion that he mis-led the Grand Jury, but that in fact he did lead them to believe that he knew Robert Marchand and that Robert Marchand was the person who supplied him with the marijuana. In addition, he was impeached with the specific statements about ANNE CURTIS and he stated that the ANNE CURTIS, or the ANNE that he talked about in the Grand Jury is the Same ANNE who was a friend or companion of Mr. MARCHAND.

And later on, he stated that there might have been some girl with BIG FOOT at another time but that was some girl whose name he did not know and the girl whose name he did not know he had never seen with the defendant, MARCHAND.

THE COURT: Well, do you claim that the identification and association with ANNE CURTIS as a, the companion of MARCHAND is the same person that was companion of BIG FOOT was brought to the attention of the trial jury? I know it was brought in the motion to - that the Government sought to establish there was adequate basis for in-court identification by ROY, independent of the photographic display, but is there anything that you recall in the transcript where that testimony before the Grand Jury was actually presented to the trial Jury?

MISS JACOBSON: Are you referring to the testimony about ANNE CURTI[illegible]

THE [illegible] Yes.

MISS JACOBSON: Yes, it was on page 240 of the transcript. There was a question that ROY responded that he had seen ANNE with the defendant, that they were living in the same house, and then the following testimony was given:

"Q. Do you recall you testified in the Grand Jury that you saw Bob or Big Foot, your supplier with ANNE?

"A. That's the way the Grand Jury testimony reads.

"Q. And is that the same ANNE you know as a friend or companion of Mr. Marchand?

"A. The ANNE that I was referring to in there, was.

"Q. It was the same one?"

And he answered by nodding his head. And that was presented to the trial jury.

THE COURT: But the text of his testimony was not read into the record as the Court recollects it.

MISS JACOBSON: I don't have my transcript with me, I believe there was some questions read referring to the fact that when he first met BIG FOOT in BRATTLEBORO, that he remembers seeing ANNE with him, or he did remember seeing a girl with him, he said, "Yes," "Who was that girl?" "I think ANNE." I believe that is in the transcript, although I don't have a page reference.

THE COURT: Well, I believe in the defense examination of the witness ROY, the defendant, the witness ROY did identify ANNE as the girl that was Mr. Marchand's fiance.

MISS JACOBSON: That's correct.

THE COURT: But is it in the Government's examination, was that specific line of inquiry, in the text of the Grand Jury minutes presented? I realize it was done in the pre-trial hearing, but was it done in the trial? The Court has looked at the extensive transcript that was made available to it yesterday and I don't find that.

MISS JACOBSON: I'm sorry I didn't bring mine down with me I have only page references to around page 40, -

THE COURT: Well, I thought perhaps you could aid the Court in pointing out specifically but go ahead, Miss Jacobson.

MISS JACOBSON: Well, Your Honor, in addition to that, we feel that since ROY did admit that Mr. MARCHAND had been a friend of his for some time, he did admit that he misled the Grand Jury, we feel that the Jury could easily find that he was perjuring himself here, or had at least perjured himself before the Grand Jury, that they were free to make that choice; we feel that if the Grand Jury, excuse me, if the trial jury believed that Mr. ROY was perjuring himself on the stand for, - before them, - that they could reasonably find that Mr. Marchand was in fact BIG FOOT. And, that Mr. ROY was acquainted with him as BIG FOOT.

We think that that, in addition to the telephone toll records and the piece of paper that was found on Mr. MARCHAND when he was arrested, were sufficient to send the case to the Jury and allow them to reach a decision.

THE COURT: Yes, Mr. Weinberg:

MR. WEINBERG: Very briefly, Your Honor, in terms of the telephone records of MR. PERKINS on cross-examination he said that he was just guessing at the number that was directed to him by Miss JACOBSON on direct examination. He said on cross, "I was just guessing, I don't know the number." In terms of whether ROY called the two, either the two numbers listed in [illegible]'s house, whether it was listed under ANNE CURTIS or BOB MARCHAND, I think is not relevant. He knew that that was the number at the house.

Most importantly, the Government states that ROY's testimony was to impeach ROY. And that's exactly what its value was. Opinions about whether he lied or mis-led and things is just to impeach ROY because the Jury doesn't believe ROY's direct testimony that he says now MARCHAND wasn't the one, there's nothing given as a basis to guess that the converse is true and that's the whole thrust of this thing. That at no time was there any Grand Jury introduced at trial during the Government's direct. The only thing the Grand Jury got was that "I think he was with ANNE." Even if it was it doesn't support the verdict, in fact, it wasn't and therefore it doesn't come into effect, that all you have is impeachment. There's lots of impeachment here, but what we're left with is really nothing. We're not left with affirmative evidence that BOB MARCHAND is BIG FOOT and because of that, we respectfully ask the verdict be set aside, Your Honor.

THE COURT: The Court will take a brief recess. I want to read the Government's brief that was tendered this morning, or the memorandum before ruling specifically on the motion. While I've had an opportunity to read both of the defendant's briefs, the initial memorandum in support of the motion and the reply memorandum, I haven't had a chance to read the one that the Government has just handed to the Court so we'll take a brief recess to consider that.

(RECESSED FROM 11:00 A.M. UNTIL 11:15 A.M.)

THE COURT: The Court is satisfied that the totality of the evidence including the circumstantial evidence in the case, as well as the identification made by the defendant, made of the defendant by the witness PERKINS and the identification made by the witness ROY before the Grand Jury, are sufficient to support the verdict finding of guilty beyond a reasonable doubt.

Motion to set aside the verdict and enter judgment of acquittal is denied. We will proceed to the sentencing.

(Sentencing is not being transcribed hereith as it was not ordered)

CERTIFICATE

I, Herman J. VESPER, hereby certify that the foregoing is a true and complete transcript of my verbatim stenotypy notes taken of the proceedings as is described on page 1, hereof, less sentencing.

Herman J. Vesper
Official Court Reporter

Rutland, Vermont
3 March 1977.

United States of America vs.

United States District Court for District of Vermont

DEFENDANT Robert Marchand

DOCKET NO. ➤ Cr. 76-51

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date ➤

MONTH	DAY	YEAR
2	18	77

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Joseph Oteri and Martin Weinberg, Esqs.
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☒ NOT GUILTY

FINDING & JUDGMENT

There being a XXXXX verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of Distribution and possession with intent to distribute marijuana in Violation of 21 United States Code 841 and 18 United States Code 2.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year with a special parole term of two years.

Defendant be fined the sum of $2,000.00 and to stand committed until fine is paid, or otherwise disposed of in due course of law.

Exectution of sentence is stayed pending outcome of appeal.

Filed February 18, 1977 Leonard W. Lafayette
Chief Deputy Clerk

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
☒ Chief Judge
☐ U.S. Magistrate

➤ Jas. S. Holden

Date February 18, 1977

CERTIFIED AS A TRUE COPY ON
THIS DATE ____
BY ____
( ) CLERK
( ) DEPUTY

A. 522.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA
v.
ROBERT P. MARCHAND, JR.

C.
No. 76-51

NOTICE OF APPEAL

. Notice is hereby given, pursuant to Rule 3(a) and Rule 4(b) of the Federal Rules of Appellate Procedure that Robert P. Marchand, Jr., defendant in the above-captioned matter, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment of guilty on the above-captioned indictment and the sentence imposed pursuant to the judgment of guilty, said judgment and sentence entered and imposed on February 18, 1977.

By his attorneys,

Joseph S. Oteri
Joseph S. Oteri

Martin G. Weinberg
Martin G. Weinberg

RW
Richard White

CERTIFICATE OF SERVICE

I, Martin G. Weinberg hereby certify that I have this day served copies of the attached Notice of Appeal, Motion to Admit to Bail and Motion for Stay of Execution of Sentence upon the United States by delivering in hand copies to Jill Jacobson, Assistant United States Attorney, U.S. Attorney's Office, Federal Building, Rutland, Vermont 05701.

Dated at Boston, Massachusetts this 18th day of February, 1977.

Martin G. Weinberg
Martin G. Weinberg

Filed February 18, 1977
Francis W. [illegible]
Deputy Clerk